

**REDACTED VERSION – RELEASED AUGUST 31, 2011**

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
DIRECTV Sports Net Pittsburgh, LLC,	)	File No. CSR-8480-P
Petitioner,	)	
	)	
v.	)	
	)	
Armstrong Utilities, Inc.,	)	
Respondent.	)	

**ORDER ON REVIEW**

**Adopted: August 10, 2011**

**Released: August 10, 2011**

By the Chief, Media Bureau:

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**I. INTRODUCTION**

1. In this *Order*, we consider a Petition filed by DIRECTV Sports Net Pittsburgh, LLC (“DSNP”) seeking *de novo* review of an arbitrator’s decision in favor of Armstrong Utilities, Inc. (“Armstrong”) in a dispute concerning the fair market value of the right to carry Fox Sports Net Pittsburgh (“FSNP”), a Regional Sports Network (“RSN”) owned by DSNP.<sup>1</sup> The arbitration proceeding was conducted pursuant to a condition established by the Commission in the *Liberty Media Order*.<sup>2</sup> For the reasons set forth below, we deny DSNP’s Petition and conclude, consistent with the arbitrator’s decision, that the Armstrong final offer most closely approximates the fair market value of the programming carriage rights at issue.

**II. BACKGROUND****A. Liberty Media Order Arbitration Conditions**

2. In the *Liberty Media Order*, the Commission approved the transfer of control of DIRECTV Group, Inc. (“DIRECTV”) from the News Corporation (“News Corp.”) to Liberty Media Corp (“Liberty Media”), subject to certain conditions.<sup>3</sup> As part of the transaction, Liberty Media acquired three RSNs formerly owned by News Corp. – FSNP, Fox Sports Net Northwest, and Fox Sports Net Rocky

<sup>1</sup> See DIRECTV Sports Net Pittsburgh, LLC, Petition for *De Novo* Review, File No. CSR-8480-P (filed April 13, 2011) (“DSNP Petition” or “Petition”). The parties proposed a briefing schedule to the Media Bureau, which the Media Bureau approved. Pursuant to this schedule, Armstrong filed an Opposition to the DSNP Petition on May 4, 2011. See Armstrong Utilities, Inc., Opposition to Petition for *De Novo* Review, File No. CSR-8480-P (filed May 4, 2011) (“Armstrong Opposition” or “Opposition”). DSNP filed a Reply to the Armstrong Opposition on May 17, 2011. See DIRECTV Sports Net Pittsburgh, Reply, File No. CSR-8480-P (filed May 17, 2011) (“DSNP Reply” or “Reply”). The parties requested confidential treatment of certain competitively sensitive information that appears in their pleadings and in the underlying arbitration record. We have redacted certain information in the public version of this *Order* in accordance with the parties’ requests for confidentiality.

<sup>2</sup> See *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, News Corporation and The DIRECTV Group, Inc., Transferors, to Liberty Media Corporation, Transferee*, Memorandum Opinion and Order, 23 FCC Rcd 3265, 3346 (2008), Appendix B, Condition IV, § A “Commercial Arbitration Remedy” (“*Liberty Media Order*”).

<sup>3</sup> See *id.* at 3305-06, ¶ 88.

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Mountain.<sup>4</sup> In approving the transaction, the Commission found that the combined entity's vertical integration would provide it with "increased incentive and ability, post-transaction, to temporarily foreclose its RSN programming" from other MVPDs.<sup>5</sup> To mitigate this harm, the Commission accepted Liberty Media's offer to abide by the same arbitration conditions with respect to RSNs that the Commission adopted previously in approving News Corp.'s acquisition of a *de facto* controlling interest in DIRECTV.<sup>6</sup>

3. These conditions provide that when negotiations fail to produce a mutually acceptable set of price, terms, and conditions for carriage of a non-broadcast RSN that is owned, managed, or controlled by Liberty Media, an MVPD may choose to submit the dispute to commercial arbitration.<sup>7</sup> The conditions require each party to submit a "final offer" for carriage of the RSN at issue.<sup>8</sup> Within 30 days of the arbitrator's appointment, the arbitrator must issue a decision choosing the final offer that "most closely approximates the fair market value of the programming carriage rights at issue."<sup>9</sup> The arbitrator may not choose a final offer that "does not permit the Liberty Media RSN to recover a reasonable share of the costs of acquiring the programming at issue."<sup>10</sup>

4. Within 30 days of the date of publication of the arbitrator's award, a party aggrieved by the award may file with the Commission a petition seeking *de novo* review.<sup>11</sup> In reviewing the award, the Commission must examine the same evidence presented to the arbitrator.<sup>12</sup> The Commission must choose the final offer that "most closely approximates the fair market value of the programming carriage rights at issue."<sup>13</sup> The Commission must issue its findings and conclusions not more than 60 days after receipt of the petition, which may be extended for one period of 60 days.<sup>14</sup> Although not explicitly stated in the conditions, the Commission's *de novo* review must also assess whether the final offer selected "does not permit the Liberty Media RSN to recover a reasonable share of the costs of acquiring the programming at issue."<sup>15</sup>

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<sup>4</sup> See *id.* at 3305, ¶ 87.

<sup>5</sup> *Id.* at 3305-06, ¶ 88.

<sup>6</sup> See *id.*; see also *General Motors Corp. and Hughes Electronics Corp., Transferors, and the News Corporation, Transferee*, Memorandum Opinion and Order, 19 FCC Rcd 473, 552-55, ¶¶ 172-77 and 677-79, Appendix F, Condition III (2004) ("*News/Hughes Order*").

<sup>7</sup> See *Liberty Media Order*, 23 FCC Rcd at 3346, Appendix B, Condition IV, ¶ 1.

<sup>8</sup> See *id.* at 3346-47, Appendix B, Condition IV, § A "Commercial Arbitration Remedy," ¶¶ 6, 8, 10.

<sup>9</sup> See *id.* at 3347, Appendix B, Condition IV, § B "Rules of Arbitration," ¶¶ 1, 3.

<sup>10</sup> See *id.* at ¶ 4.

<sup>11</sup> See *id.* at 3348, Appendix B, Condition IV, § C "Review of Final Award by the Commission," ¶ 1.

<sup>12</sup> See *id.* at ¶ 3.

<sup>13</sup> See *id.*

<sup>14</sup> See *id.* at ¶ 1

<sup>15</sup> See *id.* at 3347, Appendix B, Condition IV, § B "Rules of Arbitration," ¶ 4. Although this requirement is stated in the rules applicable to the arbitration but not stated in the rules applicable to the Commission's *de novo* review, we find no basis to disregard this requirement when conducting a *de novo* review. Moreover, we note that neither party here contends that the Commission on *de novo* review can disregard this requirement.

**REDACTED VERSION – RELEASED AUGUST 31, 2011****B. The Armstrong/DSNP Arbitration**

5. Armstrong is a cable operator in Pittsburgh, among other areas.<sup>16</sup> DSNP is the owner of FSNP, one of the RSNs subject to the *Liberty Media Order* arbitration conditions.<sup>17</sup> FSNP carries the games of Major League Baseball's Pittsburgh Pirates and the National Hockey League's Pittsburgh Penguins.<sup>18</sup> Armstrong carried FSNP pursuant to an affiliation agreement that began in October 2005 and terminated on [REDACTED].<sup>19</sup> While the parties attempted to negotiate a renewal of this agreement prior to its expiration, those negotiations were unsuccessful.<sup>20</sup>

6. On [REDACTED], Armstrong submitted a demand for arbitration pursuant to the *Liberty Media Order* arbitration conditions.<sup>21</sup> Armstrong's arbitration demand included its final offer for carriage of FSNP.<sup>22</sup> DSNP submitted its final offer for Armstrong's carriage of FSNP on [REDACTED], 2010.<sup>23</sup> Although the *Liberty Media Order* conditions require arbitrations to be completed within 30 days from the date the arbitrator is appointed,<sup>24</sup> the parties agreed to waive this deadline.<sup>25</sup> On October 18, 2010, the arbitrator appointed by the American Arbitration Association, Ms. Melissa D. Hubbard, Esq. (the "Arbitrator"), approved a Confidentiality Agreement and Protective Order proposed by the parties.<sup>26</sup> On November 24, 2010, the Arbitrator approved a stipulation concerning the production and use of certain agreements between each of the parties and Comcast.<sup>27</sup>

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<sup>16</sup> See Armstrong Opposition at 12; Proposed Findings of Fact Submitted by Armstrong Utilities, Inc. (Feb. 11, 2011), at 8-9 ("Armstrong Proposed Findings of Fact").

<sup>17</sup> See DSNP Petition at 11; Proposed Findings of Fact of Respondent DIRECTV Sports Net Pittsburgh, LLC (Feb. 11, 2011), at 2 ("DSNP Proposed Findings of Fact").

<sup>18</sup> See DSNP Petition at 11; DSNP Proposed Findings of Fact at 2.

<sup>19</sup> See Affiliation Agreement between Armstrong Utilities, Inc. and Fox Sports Net Pittsburgh LLC (effective Oct. 24, 2005), JX-1 ("2005 Armstrong/FSNP Agreement").

<sup>20</sup> See DSNP Petition at 13.

<sup>21</sup> See Armstrong Utilities, Inc., Demand for Arbitration ([REDACTED]). Armstrong's notice of intent to arbitrate kept the 2005 Armstrong/FSNP Agreement in place pending the outcome of the arbitration. See *Liberty Media Order*, 23 FCC Rcd at 3346, Appendix B, Condition IV, § A "Commercial Arbitration Remedy," ¶ 3; Armstrong Opposition at 13.

<sup>22</sup> See Affiliation Agreement between DIRECTV Sports Net Pittsburgh, LLC, and Armstrong Utilities, Inc., JX-33 ("Armstrong Final Offer").

<sup>23</sup> See Affiliation Agreement between DIRECTV Sports Net Pittsburgh, LLC, and Armstrong Utilities, Inc., JX-34 ("DSNP Final Offer").

<sup>24</sup> See *Liberty Media Order*, 23 FCC Rcd at 3347, Appendix B, Condition IV, § B "Rules of Arbitration," ¶ 1.

<sup>25</sup> See Report on Preliminary Telephonic Hearings, at 1 (Oct. 12, 2010); Report on Preliminary Hearing and Scheduling Order, at 2 (Oct. 19, 2010).

<sup>26</sup> See Confidentiality Agreement and Protective Order (Oct. 18, 2010) ("CAPO").

<sup>27</sup> See Stipulation Concerning Confidentiality of Specified Comcast Contracts (Nov. 24, 2010) ("Comcast Stipulation"). On October 28, 2010, the Arbitrator issued subpoenas to DIRECTV, Comcast, and News Corp. ("Respondents") to produce certain documents. See Subpoenas to Comcast Corporation, News Corp., and DirecTV (Oct. 28, 2010). The Arbitrator later amended these subpoenas to be hearing subpoenas instead, which would require the Respondents to produce documents and other information at the hearing and to present substantive testimony about those materials. See Arbitrator's Order (Nov. 19, 2010). The Respondents did not comply with the subpoenas. See Armstrong Opposition at 56-57. The Respondents filed a Petition for Declaratory Ruling with the Commission asking for a ruling that (i) the Federal Arbitration Act ("FAA") and state laws do not govern (continued....)

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7. The parties engaged in extensive document discovery.<sup>28</sup> Experts for each party submitted reports and rebuttal reports.<sup>29</sup> The parties submitted pre-hearing briefs on January 19, 2011.<sup>30</sup> The hearing began on January 24, 2011 and concluded on January 28, 2011.<sup>31</sup> The parties submitted proposed findings of fact on February 11, 2011.<sup>32</sup> On March 14, 2011, the Arbitrator issued her ruling in favor of Armstrong, finding that its final offer most closely approximated the fair market value of FSNP.<sup>33</sup> On April 13, 2011, DSNP filed a Petition for *De Novo* Review of the Arbitrator's decision.<sup>34</sup>

**III. DISCUSSION**

8. As discussed below, we conclude that the rates in the Armstrong final offer most closely approximate fair market value and that, although certain non-rate terms tend to favor the DSNP final offer, these non-rate terms do not tip the scales in favor of finding that the DSNP final offer most closely approximates fair market value. As an initial matter, we note that the *Liberty Media Order* arbitration

(Continued from previous page) \_\_\_\_\_  
arbitrations brought pursuant to Commission merger orders, including the *Liberty Media Order*; (ii) an arbitrator appointed under these merger orders has no jurisdiction or authority to compel third-party participation in the arbitration proceeding, through discovery, pre-hearing or hearing testimony, or otherwise; and (iii) the arbitration conditions in these merger orders authorize only limited party discovery and do not authorize third-party subpoenas. See *Public Notice, Joint Petition for Declaratory Ruling that the Liberty Order Does Not Authorize Third-Party Subpoenas*, 26 FCC Rcd 411 (MB 2011). Armstrong argues that this Petition for Declaratory Ruling is moot because the hearing concluded and the Arbitrator issued an award without the benefit of the subpoenaed information. See Armstrong Opposition at 56.

<sup>28</sup> See DSNP Proposed Findings of Fact at 3-4.

<sup>29</sup> Experts submitting reports on behalf of DSNP were Mark C. Wyche, Bortz Media and Sports Group; and Robert Thompson, Principal, Thompson Sports Group, LLC. See Expert Report of Mark C. Wyche, RX-50 (Jan. 10, 2011) (“Wyche Expert Report”); Expert Report of Robert L. Thompson, RX-74 (Jan. 8, 2011) (“Thompson Expert Report”); Rebuttal Report of Mark C. Wyche, RX-64 (Jan. 15, 2011) (“Wyche Rebuttal Expert Report”); Rebuttal Report of Robert L. Thompson, RX-75 (Jan. 15, 2011) (“Thompson Rebuttal Expert Report”). Experts submitting reports on behalf of Armstrong were Lindsay A. Gardner, Senior Advisor at Oak Tree Capital Management; and Stephen E. Siwek, Consultant at Economists, Inc. See Expert Analyses and Opinions of Lindsay Gardner, CX-44 (Jan. 3, 2011) (“Gardner Expert Report”); Expert Report of Stephen E. Siwek, CX-46 (Jan. 3, 2011) (“Siwek Expert Report”); Rebuttal Expert Report of Lindsay Gardner, CX-48 (Jan. 15, 2011) (“Gardner Rebuttal Expert Report”); Rebuttal Report of Stephen E. Siwek, CX-47 (Jan. 14, 2011) (“Siwek Rebuttal Expert Report”).

<sup>30</sup> See DIRECTV Sports Net Pittsburgh, LLC, Pre-Hearing Brief (Jan. 19, 2011) (“DSNP Pre-Hearing Brief”); Armstrong Utilities, Inc., Pre-Hearing Brief (Jan. 19, 2011) (“Armstrong Pre-Hearing Brief”).

<sup>31</sup> At the hearing, the following witnesses appeared on behalf of DSNP: Stephen Tucker, Chief Financial Officer, DSNP; Patrick Crumb, Executive Vice President of Business Affairs/General Counsel, DSNP; Mark C. Wyche, Bortz Media and Sports Group; and Robert Thompson, Principal, Thompson Sports Group, LLC. See Testimony of Stephen Tucker, Hr’g Tr. at 1084 (“Tucker Test.”); Testimony of Patrick Crumb, Hr’g Tr. at 1359-60 (“Crumb Test.”); Testimony of Mark C. Wyche, Hr’g Tr. at 874 (“Wyche Test.”); Testimony of Robert Thompson, Hr’g Tr. at 1263-64 (“Thompson Test.”). The following witnesses appeared on behalf of Armstrong: Jeffrey A. Ross, President, Armstrong; David Wittman, Vice President of Cable Marketing, Armstrong; Lindsay A. Gardner, Senior Advisor at Oak Tree Capital Management; and Stephen E. Siwek, Consultant at Economists, Inc. See Testimony of Jeffrey A. Ross, Hr’g Tr. at 107 (“Ross Test.”); Testimony of David Wittman, Hr’g Tr. at 268 (“Wittman Test.”); Testimony of Lindsay A. Gardner, Hr’g Tr. at 303-04 (“Gardner Test.”); Testimony of Stephen E. Siwek, Hr’g Tr. at 547 (“Siwek Test.”).

<sup>32</sup> See DSNP Proposed Findings of Fact; Armstrong Proposed Findings of Fact.

<sup>33</sup> See Award of Arbitrator (March 14, 2011) (“Award”).

<sup>34</sup> See DSNP Petition.

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conditions place important limitations on our *de novo* review of the final offers. First, the conditions instruct us to select the final offer that “most closely approximates the fair market value of the programming carriage rights at issue.”<sup>35</sup> That is, we must select one final offer or the other.<sup>36</sup> We do not have the discretion to craft our own affiliation agreement by selecting some terms from one final offer and other terms from the other final offer or by imposing our own terms. In addition, we are not required to assess whether the final offers reflect the actual market value of FSNP. Indeed, even if each final offer varies greatly from what we expect to be the actual fair market value of FSNP, we are required to select the final offer that “most closely approximates the fair market value of the programming carriage rights at issue.”<sup>37</sup> Second, we may not select a final offer that does not permit the RSN “to recover a reasonable share of the costs of acquiring the programming at issue.”<sup>38</sup> Third, we must examine the same evidence that was presented to the Arbitrator.<sup>39</sup> We may not hold another evidentiary hearing or allow the parties to adduce new evidence.<sup>40</sup> Fourth, we must act on the Petition for *De Novo* Review no later than 60 days after it was filed, but we may extend this review period one time for an additional 60 days.<sup>41</sup> We have previously issued a 60-day extension, thereby establishing August 11, 2011 as the deadline for our decision here.<sup>42</sup>

9. Below, we begin by discussing the definitions of “fair market value” put forth by the parties as well as a key aspect of marketplace negotiations for RSN programming – *i.e.*, an MVPD that has a greater number of subscribers and generates more revenue for an RSN will obtain better rates, terms, and conditions for carriage of the RSN than an MVPD that has fewer subscribers and generates less revenue. We then analyze the final offers submitted by DSNP and Armstrong, which contain different rates (*i.e.*, per-subscriber rates for the programming), other rate terms (*e.g.*, renewal rate resets, annual escalators), and non-rate terms (*e.g.*, advertising availabilities, curing of shortfalls in games). Below, we assess each of these aspects of the final offers and also consider whether the final offers will allow DSNP to “recover a reasonable share of the costs of acquiring the programming at issue.” As discussed in further detail below, based on our *de novo* review of the evidence and arguments in the arbitration proceeding, we find that the Armstrong final offer most closely approximates the fair market value of the programming carriage rights for FSNP and that there is no evidence demonstrating that the Armstrong final offer will not allow DSNP to “recover a reasonable share of the costs of acquiring the

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<sup>35</sup> See *Liberty Media Order*, 23 FCC Rcd at 3348, Appendix B, Condition IV, § C “Review of Final Award by the Commission,” ¶ 3.

<sup>36</sup> The Commission has explained that final offer arbitration, whereby each party submits a final offer and the arbitrator is required to choose the offer that most closely approximates fair market value, “has the attractive ‘ability to induce two sides to reach their own agreement, lest they risk the possibility that a relatively extreme offer of the other side may be selected by the arbitrator.’” See *News/Hughes Order*, 19 FCC Rcd at 552, ¶ 174 (quoting Steven J. Brams, *Negotiation Games: Applying Game Theory to Negotiation and Arbitration*, Routledge, 2003 at 264).

<sup>37</sup> See *Liberty Media Order*, 23 FCC Rcd at 3348, Appendix B, Condition IV, § C “Review of Final Award by the Commission,” ¶ 3.

<sup>38</sup> See *id.* at 3347, Appendix B, Condition IV, § B “Rules of Arbitration,” ¶ 4.

<sup>39</sup> See *id.* at 3348, Appendix B, Condition IV, § C “Review of Final Award by the Commission,” ¶ 3.

<sup>40</sup> See *TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network v. Time Warner Cable Inc.*, Memorandum Opinion and Order, 25 FCC Rcd 18099, 18099, ¶ 1 n.5 (2010).

<sup>41</sup> See *Liberty Media Order*, 23 FCC Rcd at 3348, Appendix B, Condition IV, § C “Review of Final Award by the Commission,” ¶ 3.

<sup>42</sup> See *DIRECTV Sports Net Pittsburgh, LLC v. Armstrong Utils., Inc.*, Order, DA 11-1022 (MB 2011).

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programming at issue.” We conclude that this ruling is amply supported by the arbitration record, which establishes these findings by a preponderance of the evidence.

**A. Definition of Fair Market Value**

10. Both parties, as well as the Arbitrator, put forth their interpretations of the term “fair market value.”<sup>43</sup> Neither party objects to the Arbitrator’s definition of “fair market value” as “the amount at which property would change hands between a willing seller and a willing buyer when neither is acting under compulsion and when both have reasonable knowledge of the relevant facts.”<sup>44</sup> Both parties also agree that determining fair market value requires an analysis of comparable buyers of comparable products.<sup>45</sup>

**B. The Impact of an MVPD’s Subscriber Numbers and Revenues Generated on RSN Carriage Terms**

11. The record establishes that a fundamental principle of marketplace negotiations for RSN programming and, therefore, of determining fair market value is that an MVPD will receive better rates, terms, and conditions for carriage of an RSN based on: (i) the number of subscribers the MVPD serves (the more subscribers the MVPD serves, the lower the rate); and (ii) the revenue the MVPD generates for the RSN (the more revenue the MVPD generates, the lower the rate).<sup>46</sup> The parties agree that FSNP

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<sup>43</sup> See Award at 11, ¶ 68; Wyche Expert Report, RX-50 at 6 (“[W]illingness to pay in the marketplace is the primary and most reliable measure of the fair market value of regional sports network pricing.”); Siwek Expert Report, CX-46 at 3 (“Fair Market Value is defined as the cash or cash-equivalent price at which property would change hands between a willing buyer and a willing seller, both being adequately informed of the relevant facts and neither being compelled to buy or sell.”); Wyche Test., Hr’g Tr. at 879-80 (“Traditionally, fair market value is based on what a willing seller will sell his product or service for and what a willing buyer will pay for that product or service.”); Gardner Test., Hr’g Tr. at 310-11 (“The rate that – when isolating other matters, and other areas of business, the rate that most closely reflects what a willing buyer and a willing seller would arrive at, reflective of the bundle of services provided by the programmer and the value conferred on the service, including its size and relative size to its peer group. . .”).

<sup>44</sup> Award at 11, ¶ 68; see also DSNP Proposed Findings of Fact at 7; Armstrong Proposed Findings of Fact at 23. DSNP disputes whether historical market transactions should play a role in a fair market value analysis. See DSNP Petition at 40-41; DSNP Proposed Findings of Fact at 41-43. We address this issue below. See *infra* ¶ 28.

<sup>45</sup> See DSNP Petition at 41-42, 62-63; Armstrong Proposed Findings of Fact at 22, 24; see also Award at 12, ¶ 72.

<sup>46</sup> See Armstrong Proposed Findings of Fact at 1-2 (“All of the experts agreed that rates for distributors are driven by the distributor’s gross size (in terms of subscribers receiving the RSN) and by the distributor’s value to the RSN (as measured by total revenue contribution).”); *id.* at 12-13, 24, 43; Armstrong Opposition at 15 (“The rates that a distributor pays are determined not just by the gross number of subscribers receiving the RSN, but by the total revenue that that [sic] the distributor generates for the RSN.”); Gardner Expert Report, CX-44 at 16-17 (“[A]n RSN generally is expected to give its best rates to its largest distributors based on size and concentration of their subscribership which receives the RSN programming in question. . . .”); Wyche Test., Hr’g Tr. at 897 (stating that the largest rate discounts are reserved for the largest distributors in a market); *id.* at 937 (stating that comparability of MVPDs is a function of their subscribers and revenue contribution); *id.* at 941 (stating that variation in rates paid among MVPDs depends on subscriber numbers and revenue contribution); *id.* at 969 (same); see also DSNP Proposed Findings of Fact at 27 (“Comcast dwarfs Armstrong in importance to DSNP whether measured in terms of subscribers, total deal value or annual deal value.”); Wyche Expert Report, RX-50 at 12-13 (stating that all distributors within a range pay essentially the same rate, with that range typically based on the overall number of subscribers); Thompson Expert Report, RX-74 at 4 (grouping distributors based on number of subscribers and rates); DSNP Petition at 68 (stating that Comcast is the dominant distributor of FSNP whether measured based on number of subscribers or gross revenue generated); Siwek Expert Report, CX-46 at 4 (“In a typical competitive market, a high volume buyer can generally negotiate lower per unit prices than a lower volume buyer.”); Siwek (continued....)

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affiliates in the Pittsburgh area can be classified into one of three groups based on subscribers and revenues: (i) Comcast (by far the largest MVPD in Pittsburgh, both in terms of subscribers and revenues);<sup>47</sup> (ii) the Cohort Affiliates (seven MVPDs, including Armstrong, each of which have approximately [REDACTED] subscribers, account for approximately [REDACTED] percent of FSNP's subscribers, and generate approximately [REDACTED] million in revenue annually for DSNP);<sup>48</sup> and (iii) small MVPDs (all of which have less than [REDACTED] subscribers).<sup>49</sup> Table A below ranks the various FSNP affiliates in terms of subscribers and revenue generated for DSNP. As discussed in further detail below, while the parties agree that an MVPD that has a larger number of subscribers and generates more revenue for an RSN generally will obtain better rates, terms, and conditions for carriage of the RSN than an MVPD that has fewer subscribers and generates less revenue for the RSN, they disagree as to whether Armstrong's subscriber numbers and revenues justify Armstrong receiving better rates than the other Cohort Affiliates.<sup>50</sup>

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Test., Hr'g Tr. at 554 (“[A] common principle in economics, [is] that the larger the distributor, all else equal, the more revenue that’s going to be generated.”). We note that the Arbitrator made a similar finding. *See* Award at 15, ¶ 88 (“[A]ll of the industry experts agreed that the more valuable distributors of RSN programming (based on numbers of subs and revenues paid to the RSNs) should receive lower rates on a comparative basis than those being paid by less valuable distributors.”).

<sup>47</sup> *See* Chart: FSNP Subscriber Total Market Share 2010, RX-55; Chart: FSN Pittsburgh Subscriber Counts by Zone, JX-208; Wyche Test., Hr'g Tr. at 883-84.

<sup>48</sup> The Cohort Affiliates are composed of [REDACTED]

[REDACTED]. *See* Chart: FSNP Subscriber Total Market Share 2010, RX-55; Wyche Test., Hr'g Tr. at 884-85; *see also* Armstrong Proposed Findings of Fact at 12, 22; DSNP Proposed Findings of Fact at 11-12.

<sup>49</sup> *See* Chart: FSNP Subscriber Total Market Share 2010, RX-55; Chart: FSN Pittsburgh Subscriber Counts by Zone, JX-208; JX-35, 36, and 44-162 (FSNP affiliation agreements with small MVPDs); Siwek Test., Hr'g Tr. at 567; Wyche Test., Hr'g Tr. at 884; *see also* DSNP Proposed Findings of Fact at 13.

<sup>50</sup> *See infra* ¶¶ 21, 28; *see also* Armstrong Proposed Findings of Fact at 25.

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Table A

MVPD Size in Terms of Subscribers (2010) <sup>51</sup>		MVPD Size in Terms of Revenues (2009) <sup>52</sup>	
<i>MVPD</i>	<i># of Subs</i>	<i>MVPD</i>	<i>Annual Revenue Generated for DSNP in \$millions</i>
Comcast	[REDACTED]	Comcast	[REDACTED]
Cohort Affiliates		Cohort Affiliates	
1. [REDACTED]	[REDACTED]	1. [REDACTED]	[REDACTED]
2. [REDACTED]	[REDACTED]	2. [REDACTED]	[REDACTED]
3. [REDACTED]	[REDACTED]	3. [REDACTED]	[REDACTED]
4. [REDACTED]	[REDACTED]	4. [REDACTED]	[REDACTED]
5. [REDACTED]	[REDACTED]	5. [REDACTED]	[REDACTED]
6. [REDACTED]	[REDACTED]	6. [REDACTED]	[REDACTED]
7. [REDACTED]	[REDACTED]	7. [REDACTED]	[REDACTED]
Small MVPDs	[REDACTED]	Small MVPDs	Unknown

12. While the number of subscribers served by an MVPD and the amount of revenue generated by that MVPD are related (because the RSN charges the MVPD a per-subscriber fee), it is possible that an MVPD with fewer subscribers than another MVPD will actually generate more revenue. This is because RSNs charge MVPDs more for subscribers that are located closer to the home stadiums of the teams the RSN carries (known as “zone pricing”).<sup>53</sup> The theory underlying zone pricing is that subscribers closer to the home stadiums value the games more than subscribers located on the outskirts of the viewing area.<sup>54</sup> Comparing the subscriber and revenue figures for Armstrong and [REDACTED] demonstrates the impact of zone pricing. While Armstrong trails [REDACTED] slightly in terms of subscribers, Armstrong far exceeds [REDACTED] in terms of revenue generated for DSNP because Armstrong has a greater number of subscribers in the zones closest to the stadiums where the teams play and where DSNP charges a higher per-subscriber rate for carriage of FSNP.<sup>55</sup>

<sup>51</sup> See Chart: FSNP Subscriber Total Market Share 2010, RX-55; Chart: FSN Pittsburgh Subscriber Counts by Zone, JX-208; see also Wyche Test., Hr’g Tr. at 885.

<sup>52</sup> Comcast’s revenue figures are for 2011; all other revenue figures are for 2009. See Siwek Presentation, D-1 at 15 (citing Siwek Expert Report, CX-46, Appendix A at Charts 4, 5, 7-11, and 14); Siwek Test., Hr’g Tr. at 580-82; Armstrong Proposed Findings of Fact at 12; Revenue from 2010 Comcast Affiliation Agreement Compared to Revenue from Armstrong Final Offer and DSNP Final Offer, RX-104. Although [REDACTED] revenue contribution has increased to [REDACTED] using its July 2010 subscriber numbers and 2011 rates, this still trails Armstrong’s revenue contribution from 2009. See DSNP Reply at 25.

<sup>53</sup> See Gardner Expert Report, CX-44 at 16.

<sup>54</sup> See Wyche Expert Report, RX-50 at 3. For FSNP, subscribers in the Pittsburgh area are divided into six zones. See Gardner Expert Report, CX-44 at 16.

<sup>55</sup> See Siwek Presentation, D-1 at 14-16.

**REDACTED VERSION – RELEASED AUGUST 31, 2011****C. Analysis of Final Offers****1. Analysis of Rates**

13. The difference in the rates in the parties' final offers amounts to a total of [REDACTED] over the course of the proposed five-year term (an average of [REDACTED] per year).<sup>56</sup> In this section, we assess the rates in the DSNP final offer and Armstrong's criticisms of those rates. We then assess the rates in the Armstrong final offer and DSNP's criticisms of those rates. We conclude that the rates in the Armstrong final offer most closely approximate the fair market value of the programming carriage rights for FSNP.

**a. The DSNP Final Offer****(i) Support for Proposed Rates****(a) Averaging Methodology**

14. To calculate the rates in its final offer, DSNP averaged the rates in the affiliation agreements between DSNP and three of the Cohort Affiliates [REDACTED].<sup>57</sup> DSNP concluded that these three Cohort Affiliates were most comparable to Armstrong because (i) they each negotiated renewals in [REDACTED], thus their affiliation agreements reflect current market conditions;<sup>58</sup> (ii) Armstrong and each of these Cohort Affiliates have a similar number of subscribers ([REDACTED]);<sup>59</sup> and (iii) Armstrong and each of these Cohort Affiliates contribute approximately [REDACTED] percent of DSNP's total subscribers and revenue.<sup>60</sup> In response, Armstrong argues that averaging the rates of other MVPDs has no basis in actual industry practice and bears no relation to fair market value.<sup>61</sup> Armstrong states that neither of DSNP's experts cited a single example of the use of "averaging" to set rates in negotiations.<sup>62</sup> Moreover, Armstrong notes that DSNP's CFO, Mr. Tucker, could not recall an example outside of this litigation in which rates were proposed based on the average of rates charged to other distributors.<sup>63</sup>

15. DSNP's averaging methodology did not consider the rates paid by [REDACTED], one of the Cohort Affiliates. DSNP excluded [REDACTED] because (i) its affiliation agreement includes no

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<sup>56</sup> That is, the rates in the DSNP final offer would result in Armstrong paying DSNP a total of [REDACTED] over the course of the affiliation agreement, whereas the rates in the Armstrong final offer would result in Armstrong paying DSNP a total of [REDACTED]. See Siwek Expert Report, CX-46 at 8; see also DSNP Proposed Findings of Fact at 41. Both parties' final offers provide for a five-year term ([REDACTED] (the "final offer period")). See Armstrong Final Offer, JX-33 at ARMSTRONG 005689, § 3; DSNP Final Offer, JX-34 at DSNP 015052, § 3.

<sup>57</sup> See DSNP Petition at 35, 37; DSNP Proposed Findings of Fact at 35.

<sup>58</sup> See DSNP Petition at 36-37, 42; Wyche Test., Hr'g Tr. at 888-89.

<sup>59</sup> See DSNP Petition at 35-36, 39; Wyche Test., Hr'g Tr. at 888; DSNP Proposed Findings of Fact at 38.

<sup>60</sup> See DSNP Petition at 35-36, 39; Wyche Test., Hr'g Tr. at 889. DSNP also notes that these three MVPDs are sophisticated negotiators that negotiate deals with many RSNs nationwide. See DSNP Petition at 40 n.26; DSNP Proposed Findings of Fact at 38.

<sup>61</sup> See Armstrong Opposition at 42; Armstrong Proposed Findings of Fact at 47.

<sup>62</sup> See Armstrong Opposition at 42; Armstrong Proposed Findings of Fact at 47; see also Wyche Test., Hr'g Tr. at 1065-67; Thompson Test., Hr'g Tr. at 1338-39.

<sup>63</sup> See Armstrong Opposition at 42; Armstrong Proposed Findings of Fact at 47; see also Tucker Test., Hr'g Tr. at 1244-49.

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rates for [REDACTED], one of the three zones where Armstrong has subscribers;<sup>64</sup> (ii) its affiliation agreement is older (effective [REDACTED] and scheduled to expire [REDACTED]) and thus reflects lower rates and a lower number of games offered;<sup>65</sup> and (iii) it receives DSNP's full-time high-definition ("HD") feed by virtue of a prior agreement, and the value of the full-time HD feed is not reflected in the rates in the [REDACTED] affiliation agreement.<sup>66</sup> In response, Armstrong argues that DSNP's decision to exclude the rates negotiated by [REDACTED] undermines the credibility of its averaging methodology.<sup>67</sup> Armstrong contends that DSNP should have included the rates negotiated by [REDACTED] because (i) [REDACTED] has a similar distribution of subscribers among zones as Armstrong and an overall number of subscribers that was [REDACTED] than [REDACTED] in 2010,<sup>68</sup> (ii) [REDACTED], like Armstrong, accepted [REDACTED ],<sup>69</sup> (iii) the [REDACTED] affiliation agreement was negotiated [REDACTED] before the [REDACTED] affiliation agreement, the rates of which DSNP included in its calculation;<sup>70</sup> (iv) the [REDACTED] affiliation agreement [REDACTED] as the [REDACTED] affiliation agreements, the rates of which DSNP included in its calculation;<sup>71</sup> and (v) the [REDACTED] affiliation agreement [REDACTED ] as the [REDACTED] affiliation agreements.<sup>72</sup>

16. DSNP's averaging methodology also did not include the rates paid by [REDACTED], two of the Cohort Affiliates.<sup>73</sup> DSNP excluded these rates because (i) each [REDACTED ], thus rendering these affiliation agreements incomparable for the rights Armstrong was purchasing;<sup>74</sup> (ii) the

<sup>64</sup> See DSNP Petition at 61; Affiliation Agreement between [REDACTED ]

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<sup>65</sup> See DSNP Petition at 61-62; DSNP Proposed Findings of Fact at 36; [REDACTED] Agreement, JX-41 at DSNP 000083, 91; Wyche Test., Hr'g Tr. at 887-88, 1005-06.

<sup>66</sup> See DSNP Petition at 61.

<sup>67</sup> See Armstrong Opposition at 44-45 (citing Siwek Rebuttal Expert Report, CX-47 at 8-10; Gardner Rebuttal Expert Report, CX-48 at 4-7); Armstrong Proposed Findings of Fact at 50-51.

<sup>68</sup> See Armstrong Opposition at 45; Armstrong Proposed Findings of Fact at 50; Siwek Rebuttal Expert Report, CX-47 at 9 ("Based upon subscriber information as of July 2010, [REDACTED] of Armstrong's subscribers and [REDACTED] subscribers are in Zones 1 and 2, respectively."); Siwek Test., Hr'g Tr. at 825-26 (same); Chart: FSN Pittsburgh Rates as Paid by MVPD affiliates in Zones 1A through 6, JX-209.

<sup>69</sup> See Armstrong Opposition at 45; Armstrong Proposed Findings of Fact at 50; Chart: FSN Pittsburgh Rates as Paid by MVPD affiliates in Zones 1A through 6, JX-209; Wyche Test., Hr'g Tr. at 1005; *see also infra* ¶ 43; [REDACTED]

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<sup>70</sup> See Armstrong Opposition at 45; Armstrong Proposed Findings of Fact at 51; [REDACTED ]; *cf.* Affiliation Agreement between [REDACTED ]

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<sup>71</sup> See Armstrong Opposition at 45; [REDACTED ]

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<sup>72</sup> See Armstrong Opposition at 45; Wyche Rebuttal Expert Report, RX-64, at 7.

<sup>73</sup> See Armstrong Proposed Findings of Fact at 51.

<sup>74</sup> See DSNP Petition at 57 (citing Affiliation Agreement between [REDACTED ]

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(continued....)

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affiliation agreements do not include [REDACTED],<sup>75</sup> and (iii) the affiliation agreements were negotiated in [REDACTED] and are now outdated.<sup>76</sup>

17. In calculating its average, DSNP did not use the actual rates in the [REDACTED] affiliation agreements. Rather, DSNP increased or “normalized” these rates prior to averaging them to account for the fact that neither of these MVPDs purchased the same carriage rights as Armstrong.<sup>77</sup> Unlike Armstrong,<sup>78</sup> [REDACTED] declined surcharges that would have provided it with [REDACTED].<sup>79</sup> Thus, to compare rates for a comparable product, DSNP increased [REDACTED] rates by adding the surcharges for [REDACTED].<sup>80</sup> [REDACTED] agreed to the surcharge for the [REDACTED], but only in Zones [REDACTED]<sup>81</sup> and not in [REDACTED] where [REDACTED] had no subscribers.<sup>82</sup> Thus, to compare rates for a comparable product, DSNP increased [REDACTED] rates in Zones [REDACTED] by adding the surcharge [REDACTED] that Armstrong agreed to pay.<sup>83</sup> In response, Armstrong argues that a fair market value analysis assesses what parties are willing to pay and that failing to use the actual market rates that [REDACTED] have agreed to pay defies this principle.<sup>84</sup> Moreover, because many Armstrong subscribers are located in Zone [REDACTED]

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between [REDACTED]

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<sup>75</sup> Each of DSNP’s experts observed that the rates in the [REDACTED] are [REDACTED]

]. See Wyche Test., Hr’g Tr. at 885-87; see also Thompson Expert Report, RX-74 at 5 (stating that [REDACTED]

]; DSNP Proposed Findings of Fact at 35.

<sup>76</sup> DSNP notes that [REDACTED]

]. See DSNP Petition at 58 (citing Wyche Test., Hr’g Tr. at 705-06); DSNP Proposed Findings of Fact at 35.

<sup>77</sup> See DSNP Petition at 36, 62-64; DSNP Proposed Findings of Fact at 36-38; Wyche Expert Report, RX-50 at 9-10.

<sup>78</sup> See *infra* ¶ 43.

<sup>79</sup> See DSNP Petition at 63 (citing Siwek Test., Hr’g Tr. at 574); DSNP Proposed Findings of Fact at 36-37.

[REDACTED] affiliation agreement was renewed in [REDACTED] before [REDACTED]

]. See [REDACTED]

<sup>80</sup> See DSNP Petition at 63 (citing Wyche Test., Hr’g Tr. at 890); DSNP Proposed Findings of Fact at 37.

<sup>81</sup> See DSNP Petition at 63-64 (citing [REDACTED]

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<sup>82</sup> See *id.* at 64 (citing Wyche Test., Hr’g Tr. at 890); DSNP Proposed Findings of Fact at 37-38.

<sup>83</sup> See DSNP Petition at 64 (citing Wyche Test., Hr’g Tr. at 890); DSNP Proposed Findings of Fact at 37-38.

<sup>84</sup> See Armstrong Opposition at 46; Armstrong Proposed Findings of Fact at 24, 52-53; see also Wyche Expert Report, RX-50 at 9-10; Wyche Test., Hr’g Tr. at 889-90, 1002, 1009-14; Chart: FSN Pittsburgh Rates as Paid by MVPD affiliates in Zones 1A through 6, JX-209.

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while [REDACTED] subscribers are located in [REDACTED], Armstrong claims that DSNP cannot presume that Armstrong and [REDACTED] would pay the same surcharge for additional games.<sup>85</sup>

18. *Discussion.* We conclude that DSNP's approach of averaging the rates paid by three FSNP affiliates that have fewer subscribers and generate less revenue than Armstrong is not probative of the fair market value of the carriage rights at issue. As discussed above, the record supports the fundamental principle that an MVPD with fewer subscribers and less revenue generated than another MVPD will be subject to higher rates in the marketplace.<sup>86</sup> Thus, averaging the rates of three MVPDs that are smaller than Armstrong in terms of subscribers or revenue or both would be expected to result in rates that are higher than what fair market value would dictate for Armstrong.<sup>87</sup> As discussed below, the rates in the DSNP final offer confirm this expectation.<sup>88</sup> Moreover, even if DSNP had averaged the rates of MVPDs comparable to Armstrong in terms of subscribers and revenue, we find no basis in the record to conclude that averaging is an appropriate methodology for assessing fair market value. Indeed, DSNP's witnesses could not cite examples of the use of an averaging methodology to propose rates either in industry practice or previous litigation.<sup>89</sup>

**(b) PSPPE**

19. To support the claim that the DSNP final offer most closely approximates fair market value, DSNP's expert, Mr. Wyche, put forth a per subscriber per professional event ("PSPPE") analysis of 25 RSNs nationwide using data from 2009, 2010, and 2011.<sup>90</sup> To arrive at a PSPPE figure for each RSN studied, Mr. Wyche divided the average annual revenue per subscriber for each RSN by the number of major professional events offered by the RSN.<sup>91</sup> Mr. Wyche found that DSNP's PSPPE figure is equal to or below the median and the average PSPPE figure in each year for all RSNs studied.<sup>92</sup> DSNP argues that the PSPPE analysis provides additional support for its claim that DSNP's rates reflect fair market value.<sup>93</sup> In response, Armstrong states that (i) Mr. Wyche did not cite an example of a PSPPE analysis being used in the industry;<sup>94</sup> (ii) the PSPPE analysis relied on rates from a third-party source (SNL

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<sup>85</sup> See Armstrong Opposition at 47 (citing Siwek Presentation, D-1 at 16; Ross Test., Hr'g Tr. at 115-17, 161-64, 258-59); Armstrong Proposed Findings of Fact at 53-54.

<sup>86</sup> See *supra* ¶ 11.

<sup>87</sup> As discussed above, while [REDACTED] has slightly more subscribers than Armstrong, it generates less than half of the revenue that Armstrong generates for DSNP because Armstrong has a greater number of subscribers than [REDACTED] in the zones closest to the stadiums where the teams play and where DSNP charges a higher per-subscriber rate for carriage of FSNP. See *supra* ¶ 12.

<sup>88</sup> See *infra* ¶¶ 21-22.

<sup>89</sup> See Tucker Test., Hr'g Tr. at 1244-49; Wyche Test., Hr'g Tr. at 1065-67.

<sup>90</sup> See DSNP Petition at 105; DSNP Reply at 54; DSNP Proposed Findings of Fact at 34; Wyche Rebuttal Expert Report, RX-64 at 16-18.

<sup>91</sup> See Wyche Rebuttal Expert Report, RX-64 at 16-17; Wyche Test., Hr'g Tr. at 911-12; DSNP Proposed Findings of Fact at 34.

<sup>92</sup> See Wyche Rebuttal Expert Report, RX-64 at 18; Figure 1: Normalized FSN Pittsburgh License Fees Are At or Below RSN Industry Norms, RX-70; DSNP Proposed Findings of Fact at 34.

<sup>93</sup> See DSNP Petition at 105; Wyche Rebuttal Expert Report, RX-64 at 18; DSNP Proposed Findings of Fact at 33-34.

<sup>94</sup> See Armstrong Opposition at 54; Armstrong Proposed Findings of Fact at 60.

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Kagan) and not real market rates;<sup>95</sup> and (iii) Mr. Wyche did not state that the PSPPE analysis led to any conclusions about which final offer was closer to fair market value, but only that it “helps directionally suggest[] that [DSNP’s] pricing structure is fair.”<sup>96</sup>

20. *Discussion.* We conclude that DSNP’s PSPPE analysis is not probative of fair market value. As DSNP’s expert concedes, this analysis “helps directionally suggest[] that [DSNP’s] pricing structure is fair” when compared to other RSNs nationwide, but it does not address the salient issue of the fair market value of the programming carriage rights for FSNP.<sup>97</sup> The parties agree that assessing fair market value requires an analysis of comparable buyers of comparable products.<sup>98</sup> Comparing the PSPPE figure for FSNP to the PSPPE figure for various RSNs nationwide does not attempt to analyze comparable RSNs<sup>99</sup> nor does it analyze the rates paid by comparable MVPDs.

**(ii) Analysis of DSNP’s Proposed Rates**

21. The rates proposed by DSNP in its final offer, as well as a comparison to the rates paid by other Cohort Affiliates for FSNP through 2013, are stated in Appendix A.<sup>100</sup> As summarized in Appendix A, the rates in the DSNP final offer would require Armstrong to pay higher rates than the three Cohort Affiliates deemed most comparable to Armstrong by DSNP despite these MVPDs having fewer subscribers and generating less revenue than Armstrong.<sup>101</sup> For example, from 2010-2013, Armstrong would pay [REDACTED] more per subscriber per month than [REDACTED] in Zone [REDACTED] (a [REDACTED] higher rate) despite the fact that Armstrong has [REDACTED] more subscribers than

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<sup>95</sup> See Armstrong Opposition at 54; Armstrong Proposed Findings of Fact at 60.

<sup>96</sup> See Armstrong Opposition at 54; Armstrong Proposed Findings of Fact at 60; *see also* Wyche Test., Hr’g Tr. at 912.

<sup>97</sup> Wyche Test., Hr’g Tr. at 912.

<sup>98</sup> See *supra* ¶ 10.

<sup>99</sup> See DSNP Petition at 104 (“Although comparisons between and among other RSNs may be useful, such comparisons have limitations because of differences in their geographic reach and population coverage, number of professional teams and games offered, the proximity of other RSNs, their zone pricing structures, and other factors.”); Wyche Rebuttal Expert Report, RX-64 at 15-16 (“In my experience, the PSPPE measure is helpful but does not fully account for the differences in RSNs I have already referenced.”); Wyche Test., Hr’g Tr. at 909-12.

<sup>100</sup> See Appendix A.

<sup>101</sup> See *id.*; *see also* Siwek Rebuttal Expert Report, CX-47 at 4-5 (stating that the rates in the DSNP final offer would “invert the historical ranking” of the Cohort Affiliates). By contrast, under the Armstrong final offer, Armstrong would pay rates ranging from [REDACTED] less than these three Cohort Affiliates. See Appendix B. As discussed above, DSNP’s averaging methodology considered only three Cohort Affiliates ([REDACTED]). See *supra* ¶ 14. Moreover, DSNP did not use the actual rates in the [REDACTED] affiliation agreements; rather, DSNP increased or “normalized” these rates prior to averaging them to account for the fact that neither of these MVPDs purchased the same carriage rights as Armstrong. See *supra* ¶ 17. In comparing the rates in the respective final offers with the rates paid by the other Cohort Affiliates, we adopt the approach put forth by DSNP by only considering the three Cohort Affiliates deemed comparable by DSNP and by normalizing the [REDACTED] rates as suggested by DSNP. See Appendices A and B. Even with this conservative approach, the DSNP final offer would require Armstrong to pay higher rates than the other Cohort Affiliates. See Appendix A. As Armstrong notes, if the lower actual rates paid by [REDACTED] were used, the disparity between Armstrong and these Cohort Affiliates under the DSNP final offer would be greater. See Armstrong Opposition at 41-42. *Cf.* Siwek Rebuttal Expert Report, CX-47 at Appendix A, Chart 1.

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[REDACTED] and generates [REDACTED] much revenue as [REDACTED] for DSNP.<sup>102</sup> While Armstrong would pay [REDACTED] less per subscriber per month than [REDACTED] in Zone [REDACTED] (approximately [REDACTED] less), Armstrong would pay slightly more than [REDACTED] in Zones [REDACTED] and [REDACTED].<sup>103</sup> DSNP argues that this differential is *de minimis*<sup>104</sup> and that Armstrong will return to paying less than [REDACTED] after these affiliates renew their affiliation agreements [REDACTED].<sup>105</sup> In addition, DSNP argues that because all of the Cohort Affiliates have a similar number of subscribers and generate similar amounts of revenue for DSNP, they should pay similar rates.<sup>106</sup> Armstrong responds that DSNP has offered no data or testable benchmark to support its claim that a distributor of Armstrong’s size and value to DSNP should pay substantially the same rates as smaller and less valuable DSNP distributors like [REDACTED].<sup>107</sup>

22. We conclude that the rates in the DSNP final offer are inconsistent with the fundamental principle that an MVPD that has a greater number of subscribers and generates more revenue for an RSN will obtain better rates, terms, and conditions for carriage of the RSN than an MVPD that has fewer subscribers and generates less revenue for the RSN.<sup>108</sup> The DSNP final offer violates this fundamental principle by requiring Armstrong to pay higher rates than [REDACTED] ] despite

<sup>102</sup> See Appendix A; *supra* ¶ 11 and Table A. Armstrong would also pay a slightly higher rate than [REDACTED] in Zones [REDACTED] and [REDACTED]. See Appendix A.

<sup>103</sup> See Appendix A.

<sup>104</sup> See DSNP Petition at 99-100; DSNP Proposed Findings of Fact at 49-50.

<sup>105</sup> See DSNP Petition at 68.

<sup>106</sup> See Wyche Test., Hr’g Tr. at 941 (“There’s not a big enough variance in the subscribers of these affiliates or the revenue contribution that they bring that would allow very much variation at all with respect to rates.”); *id.* at 969 (“My experience would suggest that the difference in these revenue contributions [between [REDACTED] and Armstrong’s [REDACTED]] would not suggest that there should be a significant variance in the rates. The only revenue contribution that would afford such one would be a dominant provider, such as, in this case, Comcast, which has [REDACTED] more subscribers than Armstrong.”); Thompson Test., Hr’g Tr. at 1346-47 (stating that in distinction to Comcast, which is “so much bigger than everyone else,” “once you get down to . . . the lower half of the affiliate ladder, the rates are going to be more or less all the same other than some timing related to when those deals expire and what their annual increases are.”); *see also* Wyche Expert Report, RX-50 at 12-13 (“With respect to evaluating FSN Pittsburgh’s volume discount practices, I believe that it is reasonable and appropriate . . . [that] all distributors within a range pay essentially the same rate. The parameters of that range typically are based on the overall numbers of subscribers . . . . However, if some other metric such as total percentage revenue contribution is used . . . there are very clearly three tiers of affiliates . . . .”); DSNP Proposed Findings of Fact at 38-39.

<sup>107</sup> See Armstrong Opposition at 43 (“[D]espite his years of experience, Mr. Wyche could not cite any actual data to confirm his assertions as to how ‘variation’ in distributor size does or does not impact rates – let alone to confirm that a distributor like Armstrong with [REDACTED] the DSNP subscribers as [REDACTED] and that contributes [REDACTED] the revenue to DSNP would ‘typical[ly]’ not also have at least a few percentage points ‘volume discount’ in its rates.”) (emphasis in original) (citing Wyche Test., Hr’g Tr. at 939-44); Armstrong Proposed Findings of Fact at 48; Siwek Expert Report, CX-46 at 2, 5 (“DSNP’s Final Offer . . . clearly omits any recognition of Armstrong’s size in that it proposes that Armstrong pay rates higher than the smaller distributors.”) (emphasis in original)); *see also* Armstrong Opposition at 2-3 (“DSNP’s Final Offer is so far off-market that it would ‘flip’ Armstrong from paying the lowest rates among the ‘Cohort’ cable affiliates to paying the highest in that group.”) (emphasis in original) and at 23-24; Armstrong Proposed Findings of Fact at 3-4, 43-45; Siwek Rebuttal Expert Report, CX-47 at 5; Gardner Expert Report, CX-44 at 33-37; Gardner Test., Hr’g Tr. at 370-71; Wyche Test., Hr’g Tr. at 1071 (conceding that the rates in the DSNP final offer would require Armstrong to pay rates similar to [REDACTED] ).

<sup>108</sup> See *supra* ¶ 11.

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Armstrong having more subscribers and generating more revenue for DSNP than these MVPDs. While DSNP argues that the differential is *de minimis*, there is no basis in the record to support the theory that fair market value would dictate that Armstrong pay similar rates – let alone higher rates – compared to these three Cohort Affiliates given Armstrong’s greater number of subscribers and value to DSNP. In fact, as discussed in further detail below, Armstrong’s historical benchmark analysis reveals that Armstrong has not historically paid the same or higher rates for FSNP than all Cohort Affiliates that have fewer subscribers and generate less revenue.<sup>109</sup> While we do not preclude the possibility that there may be circumstances in individual cases where fair market value would dictate that an MVPD with a greater number of subscribers and revenue generated than another MVPD should pay a higher rate, DSNP has alleged no facts here that would justify such treatment of Armstrong.

**b. The Armstrong Final Offer****(i) Support for Proposed Rates****(a) Historical Benchmark Analysis**

23. Armstrong’s expert, Mr. Siwek, provided a “historical benchmark” analysis to support Armstrong’s claim that the rates in its final offer most closely approximate the fair market value of carriage rights for FSNP.<sup>110</sup> The theory underlying this analysis is that past market precedent is a valid way to assess a proposed transaction and that the actual rates paid in actual market transactions are the best measure of fair market value.<sup>111</sup> Mr. Siwek’s analysis (i) measured the percentage differences between the rates for FSNP paid by Armstrong and the rates for FSNP paid by the other Cohort Affiliates from 2005 through [REDACTED] (the “historic period”);<sup>112</sup> and (ii) tested which of the final offers would most closely maintain those rate differentials after [REDACTED] (the “going forward” period).<sup>113</sup> Siwek developed three models as part of this analysis: (i) the “Percentage Rate” model;<sup>114</sup> (ii) the

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<sup>109</sup> See *infra* ¶ 28.

<sup>110</sup> See Siwek Expert Report, CX-46 at 7-11; Siwek Test., Hr’g Tr. at 696 (“[M]y task was to look at which of the final offers comes closest to [the fair market value] standard.”).

<sup>111</sup> See Armstrong Opposition at 26-27.

<sup>112</sup> See Second Revised Chart 2: Historical Rate Comparison 2005-10, CX-136 (demonstrating that Armstrong has received lower rates historically than the other Cohort Affiliates); Siwek Expert Report, CX-46 at 5-6 (“In the past, the pattern of rates charged for FSN Pittsburgh appears to reflect rankings of distributors by size of subscribership. As the second-largest cable system, Armstrong was assigned rates lower than other, smaller distributors ([REDACTED]).”); Siwek Expert Rebuttal Report, CX-47 at 4; Gardner Test., Hr’g Tr. at 369-70; Siwek Test., Hr’g Tr. at 631-32; Armstrong Proposed Findings of Fact at 1 (“Armstrong had consistently paid lower rates than each of [REDACTED].”) and at 43.

<sup>113</sup> See Armstrong Opposition at 27; Armstrong Proposed Findings of Fact at 27-28; Siwek Expert Report, CX-46 at 7-11; Siwek Presentation, D-1.

<sup>114</sup> This model assesses the average percentage difference between the rates Armstrong paid for FSNP and the rates each of the other Cohort Affiliates paid for FSNP during the historic period (the “historical benchmark”). See Armstrong Opposition at 29 (citing Siwek Test., Hr’g Tr. at 586-90); Armstrong Proposed Findings of Fact at 30-31. Mr. Siwek then calculated the percentage difference between the rates Armstrong would pay under each final offer and the rates that each of the Cohort Affiliates will pay in the going forward period. See Armstrong Opposition at 29 (citing Siwek Test., Hr’g Tr. at 586-90; Siwek Expert Rebuttal Report, CX-47, Appendix A at Charts 1, 2, 15-17; Siwek Presentation, D-1 at 18-23); Armstrong Proposed Findings of Fact at 30-31. Mr. Siwek then analyzed the difference between the going forward comparison for each final offer and the historical benchmarks to determine which final offer most closely approximates fair market value. See Armstrong Opposition at 29; Armstrong Proposed Findings of Fact at 30-31.

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“Contract Value” model,<sup>115</sup> and (iii) the “Average and Aggregated Rate” model.<sup>116</sup> According to Mr. Siwek, the results of each model demonstrated that the rates in the Armstrong final offer were closer to the historical benchmark than the rates in the DSNP final offer.<sup>117</sup>

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<sup>115</sup> Under this model, Mr. Siwek calculated contract value by multiplying the rates in each affiliation agreement by the number of Armstrong subscribers to calculate the total “value” or revenue each affiliation agreement would produce. *See* Armstrong Opposition at 30-31 (citing Siwek Presentation, D-1 at 25-26; Siwek Test., Hr’g Tr. at 599-603); Armstrong Proposed Findings of Fact at 32-33. This model analyzes the difference between the contract value produced by Armstrong during the historic period and the contract value it would have produced using the rates paid by the Cohort Affiliates during the historic period (the “historical benchmark”). *See* Armstrong Opposition at 30-31; Armstrong Proposed Findings of Fact at 32-33. Mr. Siwek then analyzed the difference between the contract value Armstrong would produce using the rates in each final offer and the contract value it would produce using the Cohort Affiliates’ rates in the going forward period. *See* Armstrong Opposition at 31; Armstrong Proposed Findings of Fact at 32-33. Mr. Siwek then analyzed the difference between the going forward comparison for each final offer and the historical benchmarks to determine which final offer most closely approximates fair market value. *See* Armstrong Opposition at 31; Armstrong Proposed Findings of Fact at 32-33.

<sup>116</sup> To calculate historical benchmarks under this model, Mr. Siwek (i) calculated the averages of the rates paid by Armstrong and the Cohort Affiliates in Zones 1, 2, and 4 for each six month period during the historic period; (ii) summed the averages to produce “Average and Aggregate” numbers; and (iii) analyzed the difference between the “Average and Aggregate” number for Armstrong during the historic period and the “Average and Aggregate” number for each Cohort Affiliate during the historic period (the “historical benchmark”). *See* Armstrong Opposition at 32-33 (citing Siwek Presentation, D-1 at 31-32; Siwek Test., Hr’g Tr. at 609-12); Armstrong Proposed Findings of Fact at 33-35. Mr. Siwek then calculated “Average and Aggregate” numbers for the going forward period for each Cohort Affiliate and for Armstrong using the rates in each final offer. *See* Armstrong Opposition at 32-33; Armstrong Proposed Findings of Fact at 33-35. The going forward numbers for the Cohort Affiliates were then compared to the going forward numbers for each final offer to measure their relative differences. *See* Armstrong Opposition at 32-33; Armstrong Proposed Findings of Fact at 33-35. Mr. Siwek then analyzed the difference between the going forward comparison for each final offer and the historical benchmarks to determine which final offer most closely approximates fair market value. *See* Armstrong Opposition at 32-33; Armstrong Proposed Findings of Fact at 33-35. Mr. Siwek did not calculate “Average and Aggregate” values for [REDACTED] because it has no Zone [REDACTED] customers. *See* Siwek Test., Hr’g Tr. at 614-15; *see also* Siwek Expert Report, CX-46 at Chart 22.

<sup>117</sup> *See* Siwek Test., Hr’g Tr. at 871 (stating that “the Armstrong Final Offer is consistently closer to the ‘historical benchmark’ than is the DSNP Final Offer”). Compared to the rates paid by [REDACTED], the models concluded that the rates in the Armstrong final offer were [REDACTED] percentage points (Percentage Rate model), [REDACTED] percentage points (Contract Value model), or [REDACTED] percentage points (Average and Aggregated Rate Model) closer to the historical benchmark than the rates in the DSNP final offer. *See* Siwek Test., Hr’g Tr. at 855-61 (citing Siwek Corrected Presentation, CX-137 at 1-3). Compared to the rates paid by [REDACTED], the models concluded that the rates in the Armstrong final offer were [REDACTED] percentage points (Percentage Rate model), [REDACTED] percentage points (Contract Value model), or [REDACTED] percentage points (Average and Aggregated Rate Model) closer to the historical benchmark than the rates in the DSNP final offer. *See* Siwek Test., Hr’g Tr. at 595, 606-07, 614 (citing Siwek Presentation, D-1 at 21, 28, 34). Compared to the rates paid by [REDACTED], the models concluded that the rates in the Armstrong final offer were [REDACTED] percentage points (Percentage Rate model), [REDACTED] percentage points (Contract Value model), or [REDACTED] percentage points (Average and Aggregated Rate Model) closer to the historical benchmark than the rates in the DSNP final offer. *See* Siwek Test., Hr’g Tr. at 598, 606-07, 615 (citing Siwek Presentation, D-1 at 23, 29, 35). Compared to the rates paid by [REDACTED], the models concluded that the rates in the Armstrong final offer were [REDACTED] percentage points (Percentage Rate model) and [REDACTED] percentage points (Contract Value model) closer to the historical benchmark than the rates in the DSNP final offer. *See* Siwek Test., Hr’g Tr. at 598, 609 (citing Siwek Presentation, D-1 at 22, 30).

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24. DSNP raises several criticisms of Armstrong’s historical benchmark analysis. First, DSNP argues that Armstrong did not attempt to calculate the current fair market value of the carriage rights for FSNP; rather, it measured the proximity of the final offers to its historical benchmarks.<sup>118</sup> According to DSNP, fair market value must be based on current and projected market conditions, not historical market conditions based on rates contained in agreements negotiated over the course of a decade.<sup>119</sup> In response, Armstrong argues that its historical benchmark analysis is based on the standard market valuation principle that “past market precedent is a valid and critical basis to value a proposed transaction.”<sup>120</sup> Armstrong contends that while DSNP’s experts assumed without analysis that there would not be a significant variation in rates among the Cohort Affiliates, Armstrong’s expert sought to measure the actual rate differentials among the Cohort Affiliates from 2005 through 2010 and to test which of the final offers would most closely approximate that structure going forward.<sup>121</sup>

25. Second, DSNP argues that Mr. Siwek in calculating the historical benchmarks did not know whether he was analyzing “comparable buyers” because he was unaware of how many subscribers each affiliate had and whether Armstrong had a similar number of subscribers.<sup>122</sup> According to DSNP, (i) the [REDACTED] rates used for the 2005 through 2008 time period were negotiated when [REDACTED] had only [REDACTED] FSNP subscribers, placing it outside of the Cohort Affiliate group;<sup>123</sup> and (ii) the [REDACTED] rates used for the 2005 through 2007 time period were negotiated [REDACTED] when [REDACTED] had only approximately [REDACTED] FSNP subscribers, placing it outside of the Cohort Affiliate group.<sup>124</sup> Mr. Siwek compared these rates to the rates Armstrong negotiated in 2005, when Armstrong had [REDACTED] subscribers and would be expected to negotiate lower rates than these affiliates given its far greater subscriber numbers, thereby enlarging the rate differentials between Armstrong and these affiliates.<sup>125</sup> In response, Armstrong argues that the fact that

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<sup>118</sup> See DSNP Petition at 6, 40, 100-102 (citing Gardner Test., Hr’g Tr. at 508-09; Siwek Test., Hr’g Tr. at 691-92, 695-96); see also DSNP Reply at 3, 24; DSNP Proposed Findings of Fact at 50-52.

<sup>119</sup> See DSNP Petition at 89; DSNP Proposed Findings of Fact at 41-43. DSNP emphasizes that a determination of fair market value “must be based upon ‘prevalent, economic and market conditions’ at the valuation date, not based upon historical market conditions existing years before the transaction.” See DSNP Petition at 40-41 (citing Shannon P. Pratt, Robert F. Reilly & Robert P. Schweih, *Valuing Small Businesses and Professional Practices* (Business One Irwin 1986), CX-34 at 25; Siwek Test., Hr’g Tr. at 673-75); see also Wyche Expert Report, RX-50 at 6 (stating that evidence of what distributors “recently paid and have committed to pay in the future” for comparable programming carriage rights forms “the primary basis for determining fair market value”); DSNP Proposed Findings of Fact at 41-44.

<sup>120</sup> See Armstrong Opposition at 26; see also *id.* at 35 (“A market-based benchmark is all the more necessary where, as here, there is no ‘industry standard’ for what volume or value discount a distributor of any particular size or value should receive.”); Armstrong Proposed Findings of Fact at 25; Gardner Test., Hr’g Tr. at 521.

<sup>121</sup> See Armstrong Opposition at 27; Armstrong Proposed Findings of Fact at 25.

<sup>122</sup> See DSNP Petition at 89-90, 92-95; DSNP Proposed Findings of Fact at 45-46; see also Siwek Test., Hr’g Tr. at 777-78.

<sup>123</sup> See Siwek Rebuttal Expert Report, CX-47 at Chart 4 – Subscriber Numbers Comparison.

<sup>124</sup> See DSNP Petition at 94 (citing Gardner Test., Hr’g Tr. at 506-08; Siwek Test., Hr’g Tr. at 738-40, 785); DSNP Proposed Findings of Fact at 45-46, 49.

<sup>125</sup> See DSNP Petition at 94 n.61; see also Gardner Test., Hr’g Tr. at 507-08 (agreeing that an increase in subscribers from [REDACTED] would result in a more favorable renewal rate reset for the MVPD).

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some of the affiliates have grown in subscribership since 2005 is not a change to the market pricing structure.<sup>126</sup>

26. Third, DSNP argues that Mr. Siwek did not analyze comparable buyers of “comparable products” because the programming carriage rights in each FSNP affiliation agreement differed.<sup>127</sup> DSNP contends that the affiliation agreements analyzed by Mr. Siwek contained different guarantees for the minimum number of games and some included carriage of additional RSNs and other programming.<sup>128</sup> In addition, DSNP states that Mr. Siwek compared the [REDACTED] rates in the going forward period without including any surcharges for the HD feed or additional Pirates games to allow for an accurate comparison to the programming that Armstrong was receiving upon expiration of the 2005 Armstrong/FSNP Agreement.<sup>129</sup> In response, Armstrong argues that the only variation in the programming delivered to the affiliates arose in connection with DSNP’s offer of an HD feed and a package of additional Pirates games.<sup>130</sup> Armstrong argues that this change affected the affiliates equally

<sup>126</sup> See Armstrong Opposition at 36. In addition, Armstrong notes that DSNP’s averaging methodology suffers from the same alleged flaw because it used rates that [REDACTED] negotiated [REDACTED] when [REDACTED] had only [REDACTED] subscribers, which would place [REDACTED] outside of the Cohort Affiliate group. See *id.* (citing Affiliation Agreement between [REDACTED]

[REDACTED]; Siwek Rebuttal Expert Report, CX-47 at 9; Letter from Robert L. Hoegle, Counsel to DSNP to Jennifer R. Scullion, Counsel to Armstrong, JX-218 (Dec. 16, 2010) (attaching residential FSNP subscriber numbers for [REDACTED] for January 2009 and 2010)). Based on its much lower subscriber numbers compared to Armstrong [REDACTED] would be expected to receive higher rates than Armstrong, thereby inflating the average rate calculated by DSNP for Armstrong. See Siwek Rebuttal Expert Report, CX-47 at 9.

<sup>127</sup> See DSNP Petition at 90-92, 94-95, 98; DSNP Proposed Findings of Fact at 45.

<sup>128</sup> See DSNP Petition at 90-91; Siwek Test., Hr’g Tr. at 771. DSNP notes that Mr. Siwek relied upon the following agreements: (i) a [REDACTED] affiliation agreement between [REDACTED], which included carriage terms for [REDACTED] and included a maximum of only [REDACTED] or [REDACTED] Pirates games and [REDACTED] or [REDACTED] Penguins games (see Affiliation Agreement between [REDACTED]

[REDACTED]; see also Affiliation Agreement between [REDACTED]

[REDACTED]; (ii) a [REDACTED] affiliation agreement between [REDACTED], which included carriage terms for [REDACTED] and guaranteed only [REDACTED] Major Events (not necessarily Penguins and Pirates games) (see Affiliation Agreement between [REDACTED]

[REDACTED]; (iii) a [REDACTED] affiliation agreement between [REDACTED], which included carriage rights to [REDACTED] and guaranteed only [REDACTED] events without a specific number of Pirates or Penguins games (see [REDACTED]

[REDACTED]; (iv) the [REDACTED], which was negotiated as part of a larger deal for [REDACTED] (see [REDACTED]); and (v) the [REDACTED] carriage rights for [REDACTED] (see [REDACTED]). See DSNP Petition at 83-85.

<sup>129</sup> See DSNP Petition at 95 (citing Siwek Test., Hr’g Tr. at 780-81); Wyche Rebuttal Expert Report, RX-64 at 6.

<sup>130</sup> See Armstrong Opposition at 36; see Chart: FSN Pittsburgh Subscriber Counts by Zone, JX-208 (showing Cohort Affiliates broken out by zone and subscribership and noting which affiliates declined the additional games). Other than [REDACTED], each of the other Cohort Affiliates took some or all of the additional programming by agreeing to a surcharge. See Chart: FSN Pittsburgh Subscriber Counts by Zone, JX-208. [REDACTED] took the additional programming and a rate increase as part of the [REDACTED] renewal of its affiliation agreement. See Term Sheet between [REDACTED]

[REDACTED] agreed to a surcharge for the additional Pirates games in Zones [REDACTED] (continued....)

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such that the rates paid by each of the affiliates reflect the relative size and value differentials among the affiliates.<sup>131</sup>

27. Fourth, DSNP argues that Mr. Siwek compared the old rates in the 2005 Armstrong/FSNP Agreement with the new rates negotiated by the Cohort Affiliates in their recent renewal agreements, thereby resulting in a greater disparity between Armstrong's rates and the Cohort Affiliate's rates.<sup>132</sup> In response, Armstrong argues that market rates are always a mixture of "old" and "new" contract rates, but this does not invalidate the comparison.<sup>133</sup> In addition, Mr. Siwek re-ran his calculations to use only periods in which a comparison could be made between Armstrong's rates and the rates paid under the agreement preceding each Cohort Affiliate's most recent renewal.<sup>134</sup> According to Armstrong, even under this revised analysis, the rates in the Armstrong final offer are closer to the historical benchmarks with respect to [REDACTED].<sup>135</sup>

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and [REDACTED] only. See [REDACTED]

] See [REDACTED]

].

<sup>131</sup> See Armstrong Opposition at 36; see also Armstrong Proposed Findings of Fact at 52-55.

<sup>132</sup> See DSNP Petition at 93, 97-98; DSNP Proposed Findings of Fact at 46-47. For example, Mr. Siwek compares the rates in the 2005 Armstrong/FSNP Agreement (which had not yet been renewed) with: (i) [REDACTED] 2010 rates under the [REDACTED]; (ii) [REDACTED] 2010 rates under the [REDACTED]; and (iii) [REDACTED] 2010 rates under the [REDACTED]. See Siwek Rebuttal Expert Report, CX-47, Appendix A at Revised Chart 2; Siwek Test., Hr'g Tr. at 746-48.

<sup>133</sup> See Armstrong Opposition at 33-34 (citing Gardner Test., Hr'g Tr. at 342-44, 357-61, 423); Armstrong Proposed Findings of Fact at 36. In addition, Armstrong notes that DSNP's averaging methodology suffers from the same alleged flaw because it used rates from one [REDACTED] affiliation agreement ([REDACTED]) and two affiliation agreements in [REDACTED]. See Armstrong Opposition at 34; Armstrong Proposed Findings of Fact at 36.

<sup>134</sup> See Armstrong Opposition at 34-35; Armstrong Proposed Findings of Fact at 37; Siwek Test., Hr'g Tr. at 617-19; Siwek Presentation, D-1 at 37-49. For example, under this "alternative historical periods" approach, the benchmark period for [REDACTED] is 2005 through 2008 [REDACTED]. See Armstrong Opposition at 34; Siwek Presentation, D-1 at 37. DSNP argues that Mr. Siwek used the wrong 2008 rate for [REDACTED] in conducting his historical benchmark analysis. See DSNP Petition at 96-97; DSNP Reply 20-21; DSNP Proposed Findings of Fact at 48-49; see also Armstrong Opposition at 34, 38-39; Armstrong Proposed Findings of Fact at 29-30. Armstrong argues that the rate it used came directly from an internal DSNP document in the record and that DSNP never called any DSNP personnel at the hearing to contest the accuracy of the 2008 rate for [REDACTED] used by Mr. Siwek. See Armstrong Opposition at 38-39 (citing Email from Dale Albright, Director, Affiliate Relations, Liberty Sports Group to [REDACTED]); Armstrong Proposed Findings of Fact at 29. DSNP responds that Armstrong should have relied on a different internal DSNP document in the record that reflected [REDACTED]. See DSNP Petition at 96-97 (citing Email from Steve Schwartz, Vice President, Affiliate Relations, Liberty Sports [REDACTED]); DSNP Reply 20-21; DSNP Proposed Findings of Fact at 48-49. In any event, Armstrong notes that Mr. Siwek re-calculated the historical benchmarks using only [REDACTED] rates for [REDACTED] (and omitting the 2008 rates) and concluded that Armstrong's final offer was still closer to the historical benchmarks for [REDACTED] than DSNP's final offer. See Armstrong Opposition at 34-35; Armstrong Proposed Findings of Fact at 37-38; Siwek Charts, CX-137; Siwek Test., Hr'g Tr. at 852-61.

<sup>135</sup> See Armstrong Opposition at 34; Armstrong Proposed Findings of Fact at 37; Siwek Presentation, D-1 at 37-49; Siwek Test., Hr'g Tr. at 617-29.

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28. *Discussion.* We disagree with DSNP’s claim that Armstrong’s historical benchmark analysis is irrelevant in assessing which final offer most closely approximates fair market value. To be sure, Armstrong’s historical benchmark analysis may not be dispositive in attempting to calculate the current actual fair market value of the carriage rights for FSNP. The *Liberty Media Order* arbitration conditions, however, do not require us to determine whether each party has calculated the actual fair market value of FSNP. Rather, we must determine which final offer “most closely approximates” fair market value. DSNP’s criticisms notwithstanding, there is no dispute that Armstrong’s analysis demonstrates at the very least that Armstrong has not historically paid the same or higher rates than all other Cohort Affiliates that have fewer subscribers and generate less revenue than Armstrong.

**(ii) Analysis of Armstrong’s Proposed Rates****(a) Armstrong’s Rates Compared to the Cohort Affiliates’ Rates**

29. The rates proposed in the Armstrong final offer, as well as a comparison to the rates paid by other Cohort Affiliates, are stated in Appendix B.<sup>136</sup> As summarized in Appendix B, the rates in the Armstrong final offer would provide Armstrong with the following discounts for carriage of FSNP relative to other Cohort Affiliates depending on the zone and the particular Cohort Affiliate being compared: [REDACTED] per subscriber per month ([REDACTED] percent to [REDACTED] percent discount) in 2010; [REDACTED] per subscriber per month ([REDACTED] percent to [REDACTED] percent discount) in 2011; [REDACTED] per subscriber per month ([REDACTED] percent to [REDACTED] percent discount) in 2012; [REDACTED] per subscriber per month ([REDACTED] percent to [REDACTED] percent discount) in 2013.<sup>137</sup> DSNP argues that these discounts are too high and the rates are [REDACTED]

[REDACTED].<sup>138</sup> In response, Armstrong argues that its rates are justified given Armstrong’s size and value to DSNP relative to the other Cohort Affiliates<sup>139</sup> and because its rates are closer to the historical benchmarks than the rates in the DSNP final offer.<sup>140</sup> In any event, Armstrong argues that DSNP cannot claim that Armstrong’s proposed discount is too high relative to the Cohort Affiliates because DSNP never introduced evidence assessing whether or not there are significant rate differentials among the Cohort Affiliates according to their relative size and value.<sup>141</sup>

30. We conclude that the difference between Armstrong’s proposed rates and the rates the Cohort Affiliates pay does not demonstrate that the rates in the Armstrong final offer are inconsistent with

<sup>136</sup> See Appendix B; see *supra* n.101 (explaining that the rates set forth in Appendices A and B consider only the three Cohort Affiliates deemed comparable by DSNP and normalize the [REDACTED] rates as suggested by DSNP).

<sup>137</sup> See Appendix B.

<sup>138</sup> See DSNP Petition at 64-73; DSNP Proposed Findings of Fact at 39-41; Wyche Test., Hr’g Tr. at 896-97; Wyche Rebuttal Expert Report, RX-64 at 7-8; Thompson Expert Report, RX-74 at 6.

<sup>139</sup> See Armstrong Opposition at 40-42; Siwek Expert Report, CX-46 at 2; Siwek Test., Hr’g Tr. at 582.

<sup>140</sup> See Armstrong Opposition at 26-35; Siwek Test., Hr’g Tr. at 871 (stating that “the Armstrong Final Offer is consistently closer to the ‘historical benchmark’ than is the DSNP Final Offer”); see also *supra* ¶ 23.

<sup>141</sup> See Armstrong Proposed Findings of Fact at 25 (“DSNP’s experts simply asserted that the difference in size/value among the Cohort Affiliates were not sufficient to yield material differences in rates . . . . But DSNP’s experts failed to cite any data or benchmark that could be tested to see whether their assertions were accurate.”); see also Armstrong Opposition at 4, 27; *supra* n.107.

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fair market value. While DSNP argues that Armstrong’s rates are too low and its discounts are too high relative to the other Cohort Affiliates, the *Liberty Media Order* arbitration conditions do not require us to determine whether each party has calculated the actual fair market value of FSNP. Rather, we are required to determine which final offer “most closely approximates fair market value.” Given the choice between a final offer that is consistent with the fundamental principle of marketplace negotiations for RSN programming that larger MVPDs will receive better rates and a final offer that violates this principle, we find that the final offer consistent with this fundamental principle “most closely approximates fair market value.” Moreover, despite DSNP’s concern that Armstrong’s rates are too low, Armstrong will still generate the most revenue by far among the Cohort Affiliates even with the allegedly low rates in the Armstrong final offer.<sup>142</sup> In addition, DSNP has presented no standards or benchmarks that would allow us to assess whether a discount is too high as DSNP alleges.

**(b) Armstrong’s Rates Compared to Comcast’s Rates**

31. The record establishes that Comcast is by far the largest DSNP affiliate in terms of subscribers<sup>143</sup> and revenues generated.<sup>144</sup> The record also establishes that no other affiliate is comparable to Comcast in terms of importance to DSNP and that its rates should therefore be lower than the rates of any other affiliate.<sup>145</sup> Despite Comcast’s size and value to DSNP relative to Armstrong, [REDACTED].<sup>146</sup> For example, comparing the rates in the 2010 Comcast/DSNP Agreement<sup>147</sup> with the rates proposed in the Armstrong

<sup>142</sup> Based on the rates in the Armstrong final offer, Armstrong would produce [REDACTED] in revenue for DSNP in 2011. See Armstrong Opposition at 40; Armstrong Proposed Findings of Fact at 39; Siwek Presentation, D-1 at 54; Siwek Test., Hr’g Tr. at 637-38. The other Cohort Affiliates would produce [REDACTED] less revenue for DSNP: [REDACTED] less than Armstrong); [REDACTED] less than Armstrong); [REDACTED] than Armstrong); and [REDACTED] less than Armstrong). See Armstrong Opposition at 40; Armstrong Proposed Findings of Fact at 39; Siwek Presentation, D-1 at 54; Siwek Test., Hr’g Tr. at 637-38.

<sup>143</sup> See *supra* Table A. Comcast subscribers account for [REDACTED] of all subscribers to FSNP. See DSNP Petition at 68 (citing Award at 8, ¶47; Wyche Test., Hr’g Tr. at 883-84; Thompson Test., Hr’g Tr. at 1274). Armstrong has far fewer subscribers than Comcast ([REDACTED]). See *supra* Table A. Moreover, of Comcast’s [REDACTED] subscribers, over [REDACTED] are located in [REDACTED]. See Chart: FSN Pittsburgh Subscriber Counts by Zone, JX-208.

<sup>144</sup> See *supra* Table A.

<sup>145</sup> See DSNP Petition at 69-70; DSNP Proposed Findings of Fact at 25-27; Gardner Expert Report, CX-44 at 20 (“Comcast rates typically are lower even than the [REDACTED]”). I have not seen Comcast rates or agreements concerning FSN Pittsburgh. However, again, the subscriber numbers alone confirm that Comcast should receive the best rates among distributors for FSN Pittsburgh (assuming that Comcast has some reasonable mix of subscribers in various zones.”); Wyche Expert Report, RX-50 at 12-13 (“In my opinion, Comcast alone stands apart from the other FSN Pittsburgh affiliates sufficiently to obtain a very substantial volume discount by virtue of its [REDACTED] percent overall share of FSN Pittsburgh’s paying subscriber base.”); Thompson Expert Report, RX-74 at 9 (“Because Comcast is the dominant distributor . . . of FSN Pittsburgh . . . , I would expect the license fees paid by Comcast to be much lower than the license fees paid by any other distributor of FSN Pittsburgh . . . . Given the leverage on the part of Comcast, I expect that there is a very substantial percentage differential between the license fees paid by Comcast and the license fees payable by Armstrong and the other cable distributors at the [REDACTED] to [REDACTED] subscriber level.”).

<sup>146</sup> See DSNP Petition at 6, 55, 71-73; DSNP Proposed Findings of Fact at 27-29.

<sup>147</sup> On March 15, 2010, Comcast entered into an affiliation agreement with DSNP for carriage of FSNP from January 1, 2010 through December 31, 2015. See Affiliation Agreement between Comcast Cable Communications, (continued....)

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final offer: (i) Comcast would receive [REDACTED]<sup>148</sup> or [REDACTED]<sup>149</sup> discount relative to the rates proposed by Armstrong<sup>150</sup> (whereas the rates in the DSNP final offer would provide Comcast with a [REDACTED] discount relative to Armstrong<sup>151</sup>); (ii) Armstrong would pay [REDACTED

];<sup>152</sup> and (iii) Armstrong would pay [REDACTED  
].<sup>153</sup>

32. Armstrong notes that there is no dispute that Comcast will receive a discount relative to Armstrong.<sup>154</sup> [REDACTED

]. First, Armstrong contends that there is no “industry standard” for what discount a

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LLC and DIRECTV Sports Net Pittsburgh, LLC (effective Jan. 1, 2010), RX-3 (“2010 Comcast/DSNP Agreement”).

<sup>148</sup> To calculate this percentage, DSNP took the number of Comcast subscribers in 2010 in Zones 1, 2, and 4 (*i.e.*, zones where both Comcast and Armstrong have subscribers); calculated the revenues generated using the rates in Comcast’s current contract by multiplying these subscriber figures by the rates in the 2010 Comcast/DSNP Agreement for the final offer period (amounting to [REDACTED]); calculated the revenues generated using the rates in the Armstrong final offer by multiplying these subscriber figures by the rates in the Armstrong final offer (amounting to [REDACTED]); divided the two revenue figures to calculate the discount Comcast would receive relative to the rates proposed by Armstrong ([REDACTED]). *See* DSNP Petition at 72-73; DSNP Proposed Findings of Fact at 28-29; Chart: Revenue from 2010 Comcast Affiliation Agreement Compared to Revenue from Armstrong Final Offer and DSNP Final Offer (Using 2010 Comcast Subscribers in Zones 1, 2 and 4), RX-104T; Tucker Test., Hr’g Tr. at 1116, 1125-30.

<sup>149</sup> To calculate this percentage, Armstrong took the number of Armstrong subscribers in each zone; calculated the revenues generated using the rates in Comcast’s current contract by multiplying the Armstrong subscriber figures by the rates in the 2010 Comcast/DSNP Agreement for the final offer period (amounting to [REDACTED]); calculated the revenues generated using the rates in the Armstrong final offer by multiplying the Armstrong subscriber figures by the rates in the Armstrong final offer (amounting to [REDACTED]); divided the two revenue figures to calculate the discount Comcast would receive relative to the rates proposed by Armstrong ([REDACTED]). *See* Armstrong Opposition at 67 (citing Armstrong Proposed Findings of Fact at 72; Tucker Test., Hr’g Tr. at 1191-92). DSNP states that this calculation would result in a discount of [REDACTED], not [REDACTED]. *See* DSNP Reply at 49 n.41.

<sup>150</sup> By contrast, the rates in the Armstrong final offer would provide Armstrong with a discount ranging from [REDACTED] percent to [REDACTED] percent relative to the other Cohort Affiliates, despite the fact that the Cohort Affiliates (including Armstrong) each have [REDACTED] subscribers and generate [REDACTED] million to [REDACTED] million in revenue for DSNP. *See* Appendix B; *supra* ¶ 29 and Table A.

<sup>151</sup> *See* DSNP Petition at 73; DSNP Proposed Findings of Fact at 29; Chart: Revenue from 2010 Comcast Affiliation Agreement Compared to Revenue from Armstrong Final Offer and DSNP Final Offer (Using 2010 Comcast Subscribers in Zones 1, 2 and 4), RX-104T; Tucker Test., Hr’g Tr. at 1116, 1125-30.

<sup>152</sup> *See* DSNP Petition at 71; DSNP Proposed Findings of Fact at 27-28.

<sup>153</sup> *See* DSNP Petition at 71; DSNP Proposed Findings of Fact at 27-28. According to DSNP, at the end of the terms of their respective agreements, Armstrong would be paying rates that are [REDACTED] Comcast’s rates in Zone [REDACTED] (where Comcast has [REDACTED] subscribers compared to [REDACTED] for Armstrong) and [REDACTED] Comcast’s rates in Zone [REDACTED] (where Comcast has approximately [REDACTED] subscribers compared to [REDACTED] for Armstrong). *See* DSNP Petition at 72 (citing 2010 Comcast/DSNP Agreement, RX-3 at DSNP 007806, § 5(b); Chart: Rates in Armstrong Final Offer (Siwek Chart 1), RX-107); DSNP Proposed Findings of Fact at 28.

<sup>154</sup> *See* Armstrong Opposition at 8, 55; *supra* ¶ 31.

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distributor of any particular size or value should receive.<sup>155</sup> Armstrong's expert, Mr. Gardner, testified that the discounts afforded to Comcast "can be anywhere from [REDACTED] percent,"<sup>156</sup> but that he had "no feel for, at all, as to what Comcast[s] discount might be here."<sup>157</sup> DSNP notes that the [REDACTED] discount it calculates that Comcast would receive relative to Armstrong falls outside of the range put forth by Mr. Gardner.<sup>158</sup>

33. Second, Armstrong explains that there is no reliable evidence in the record as to the discount Comcast received relative to Armstrong prior to 2010.<sup>159</sup> Armstrong claims that the record included a term sheet that listed the "baseline rates" that Comcast paid for FSNP prior to 2010,<sup>160</sup> but the rates did not reflect [REDACTED] and thus did not reflect the actual, net effective rate paid by Comcast.<sup>161</sup> Armstrong submits that, without knowing the discount that Comcast received relative to Armstrong prior to 2010, there is no basis for assessing what that discount should be now or which final offer proposes rates commensurate with that discount.<sup>162</sup>

34. Third, Armstrong argues that there is no basis to conclude that the 2010 Comcast/DSNP Agreement is comparable to the final offers here because no expert was allowed to review this affiliation agreement.<sup>163</sup> While the parties entered into a Confidentiality Agreement and Protective Order,<sup>164</sup> Comcast deemed this agreement insufficient to satisfy the confidentiality provisions in the 2010 Comcast/DSNP Agreement.<sup>165</sup> The parties agreed to a stipulation whereby a redacted version of the 2010 Comcast/DSNP Agreement was produced, provided that neither party's experts could review the redacted agreement.<sup>166</sup> Because no expert was allowed to review the 2010 Comcast/DSNP Agreement, Armstrong

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<sup>155</sup> See Armstrong Opposition at 35; Armstrong Proposed Findings of Fact at 25; see also Siwek Test., Hr'g Tr. at 521, 559-60; Siwek Expert Report, CX-46 at 7-8.

<sup>156</sup> Gardner Test., Hr'g Tr. at 726.

<sup>157</sup> *Id.* at 729.

<sup>158</sup> See DSNP Petition at 73; DSNP Proposed Findings of Fact at 29.

<sup>159</sup> See Armstrong Opposition at 65-66; see also *id.* at 8 ("[N]o fact or expert witness testified to what the 'discount' has been or should be between Armstrong's rates and Comcast's rates. Nor could they. Key data was missing from the record such that no one knows what Comcast had been paying prior to its recent 2010 renewal."); Armstrong Proposed Findings of Fact at 70.

<sup>160</sup> See Armstrong Opposition at 65.

<sup>161</sup> See *id.* at 65-66. At hearing, DSNP argued that it was unfair to look only at baseline rates without netting out certain [REDACTED]. See DSNP Reply at 48; Armstrong Opposition at 65; Hr'g Tr. at 1207-09. Armstrong argued that, if these rate reductions were included, then certain [REDACTED] that Comcast agreed to pay, which would raise the net effective rate, also needed to be included in order to determine the actual, net effective rate paid by Comcast. See Armstrong Opposition at 65; Hr'g Tr. at 1209-14. While DSNP calculated that Comcast received a [REDACTED] discount relative to Armstrong in Zone [REDACTED] in 2009, Armstrong contends that the data are unreliable because they do not reflect the [REDACTED] made by Comcast to DSNP. See DSNP Petition at 72 n.49; Armstrong Opposition at 65-66; DSNP Reply at 48.

<sup>162</sup> See Armstrong Opposition at 66; Armstrong Proposed Findings of Fact at 71.

<sup>163</sup> See Armstrong Opposition at 58-59; Armstrong Proposed Findings of Fact at 69.

<sup>164</sup> See Confidentiality Agreement and Protective Order (Oct. 18, 2010).

<sup>165</sup> See Armstrong Opposition at 57.

<sup>166</sup> See Stipulation Concerning Confidentiality of Specified Comcast Contracts (Nov. 24, 2010) ("Comcast Stipulation").

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notes that no expert could opine that the affiliation agreement was comparable for purposes of the fair market value analysis.<sup>167</sup> In response, DSNP notes that Armstrong agreed to the condition in the Comcast Stipulation limiting expert review.<sup>168</sup> DSNP also notes that the Arbitrator admitted the 2010 Comcast/DSNP Agreement into evidence; states that Armstrong represented to the Arbitrator that the 2010 Comcast/DSNP Agreement is relevant to the fair market value analysis; and argues that there was a sufficient basis to deem the 2010 Comcast/DSNP Agreement comparable to the final offers here because all involved the same number of Pirates and Penguins games, the same zones, and the same time period.<sup>169</sup> DSNP also notes that Armstrong’s expert, Mr. Gardner, opined without reviewing the 2010 Comcast/DSNP Agreement that “subscriber numbers alone” dictate that Comcast should receive the best rates among FSNP affiliates.<sup>170</sup>

35. Fourth, Armstrong argues that there is no basis to conclude that the 2010 Comcast/DSNP Agreement is comparable to the final offers because the 2010 Comcast/DSNP Agreement contains a different “basket of rights” with unique and valuable provisions relative to the final offers and the Cohort Affiliates’ affiliation agreements.<sup>171</sup> Armstrong argues that these provisions mean that no comparison can be made between the rates in the 2010 Comcast/DSNP Agreement and the rates in the final offers without an expert analysis of comparability.<sup>172</sup> While experts were not allowed to review the 2010 Comcast/DSNP Agreement, they were asked at the hearing in general terms about these provisions and testified that they are unusual or uniquely valuable.<sup>173</sup> In response, DSNP notes that the affiliation agreements upon which Armstrong’s expert relied in his historical benchmark analysis could also be described as containing a different “basket of rights” than the final offers here,<sup>174</sup> yet Armstrong’s expert

<sup>167</sup> See Armstrong Opposition at 59; Armstrong Proposed Findings of Fact at 69. For example, when the Arbitrator asked DSNP’s expert, Mr. Wyche, for his opinion as to whether the 2010 Comcast/DSNP Agreement should be considered a comparable affiliation agreement, Mr. Wyche responded, “I don’t know because I didn’t get to read the contract.” See Wyche Test., Hr’g Tr. at 936; Armstrong Opposition at 59 n.43; Armstrong Proposed Findings of Fact at 69. When DSNP’s counsel asked Armstrong’s expert, Mr. Gardner, whether he would expect Armstrong to receive a lower rate than Comcast for FSNP, he stated, “It’s impossible for me to make a judgment on that . . . I don’t know what’s in the Comcast deal.” See Gardner Test., Hr’g Tr. at 731; Armstrong Opposition at 59 n.43; Armstrong Proposed Findings of Fact at 69.

<sup>168</sup> See DSNP Petition at 75 n.52; see also Comcast Stipulation.

<sup>169</sup> See DSNP Reply at 41; see also DSNP Petition at 85.

<sup>170</sup> See DSNP Reply at 42; Gardner Expert Report, CX-44 at 19-20.

<sup>171</sup> See Armstrong Opposition at 62-64; Armstrong Proposed Findings of Fact at 72-75. Among other unique provisions, the 2010 Comcast/DSNP Agreement includes **[REDACTED]**

J. See Armstrong Opposition at 63; Armstrong Proposed Findings of Fact, Schedule A.

<sup>172</sup> See Armstrong Opposition at 62-63; see *id.* at 9 (“Where, as here, it appears that one distributor is paying for a custom-made ‘Ferrari,’ while all the others are paying for off-the-line ‘Buicks,’ there is no valid basis to compare the rates each is paying for the different products.”); Armstrong Proposed Findings of Fact at 5, 73.

<sup>173</sup> See Armstrong Opposition at 64; Gardner Test., Hr’g Tr. at 402-09; Wyche Test., Hr’g Tr. at 989-92; Thompson Test., Hr’g Tr. at 1326, 1335-37, 1340.

<sup>174</sup> See DSNP Petition at 85; *id.* at 81 n.57 **[REDACTED]**

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testified that he analyzed only the “actual rates paid” without analyzing these other provisions.<sup>175</sup> According to DSNP, it would be a “double standard” for these other provisions to render the 2010 Comcast/DSNP Agreement as not comparable but to ignore these provisions in analyzing the affiliation agreements underlying the historical benchmark analysis.<sup>176</sup> Armstrong responds that there is no “double standard” because (i) the provisions it cites from the 2010 Comcast/DSNP Agreement are unique to this agreement and do not appear in the affiliation agreements underlying the historical benchmark analysis or in the final offers;<sup>177</sup> (ii) unlike with the 2010 Comcast/DSNP Agreement, experts were permitted to review the affiliation agreements underlying the historical benchmark analysis to make an assessment as to whether or not they were comparable to the final offers;<sup>178</sup> and (iii) both sides treated the Cohort Affiliates’ affiliation agreements as comparable despite some variation in terms.<sup>179</sup> DSNP argues that Armstrong in agreeing to the Comcast Stipulation conceded that many provisions of the 2010 Comcast/DSNP Agreement were not relevant to this proceeding and could be redacted provided that “pricing, minimum game content, or most favored nations provisions” were not redacted.<sup>180</sup> Armstrong disputes this characterization, arguing that it never agreed that “pricing, minimum game content, or most favored nations provisions” were the only relevant provisions and that, despite the Comcast Stipulation, the unique provisions in the 2010 Comcast/DSNP Agreement are now part of the record.<sup>181</sup> In any event, DSNP notes that its expert testified that non-rate terms, such as those Armstrong identifies as unique in the 2010 Comcast/DSNP Agreement, are negotiated after rates are agreed upon and do not impact the rates.<sup>182</sup>

36. Fifth, Comcast (as a programmer) and DSNP’s parent, DIRECTV<sup>183</sup> (a distributor), were negotiating deals pertaining to DIRECTV’s carriage of Comcast RSNs and Comcast’s Versus network at the same time that Comcast (as a distributor) and DSNP were negotiating deals pertaining to Comcast’s carriage of DSNP and other DIRECTV-owned RSNs.<sup>184</sup> Armstrong claims that these simultaneous deals

<sup>175</sup> See DSNP Petition at 83 (citing Siwek Test., Hr’g Tr. at 769-76); DSNP Reply at 43 (stating that Armstrong’s expert, Mr. Siwek, in assessing the affiliation agreements used in his historical benchmark analysis, looked at only the actual rates in those agreements and did not consider the provisions that Armstrong deems relevant in assessing the 2010 Comcast/DSNP Agreement, such as what rights were obtained by the affiliate) (citing Siwek Test., Hr’g Tr. at 552-53, 740-42); see also DSNP Petition at 85 (citing Siwek Test., Hr’g Tr. at 743-48).

<sup>176</sup> See DSNP Petition at 74, 81 n.57; DSNP Reply at 44.

<sup>177</sup> See Armstrong Opposition at 63-64; Armstrong Proposed Findings of Fact at 72-73; see also *supra* n.171.

<sup>178</sup> See Armstrong Opposition at 63; see also Armstrong Proposed Findings of Fact at 69.

<sup>179</sup> See Armstrong Opposition at 63-64.

<sup>180</sup> See DSNP Petition at 82; see also *id.* at 75 (citing Comcast Stipulation at ¶ 3); DSNP Reply at 42; DSNP Proposed Findings of Fact at 30.

<sup>181</sup> See Armstrong Opposition at 57 n.41; see also Comcast Stipulation.

<sup>182</sup> See DSNP Petition at 82; DSNP Reply at 42-43 (“Once the financial terms are agreed upon, the negotiation of the other provisions does not affect those financial terms.”); see also Thompson Test., Hr’g Tr. at 1289-90, 1301-02, 1347-49.

<sup>183</sup> See Crumb Test., Hr’g Tr. at 1361; see also Armstrong Opposition at 13-14; Tucker Test., Hr’g Tr. at 1259-60 (DSNP’s CFO, Mr. Tucker, testifying that DSNP shares its “budgets and operations and forecasts with DIRECTV” and that “[o]ur numbers roll up into DIRECTV”); Armstrong Proposed Findings of Fact at 10-11.

<sup>184</sup> See Crumb Test., Hr’g Tr. at 1367; Tucker Test., Hr’g Tr. at 1260-61; see also Armstrong Opposition at 59-60. On the same day that the 2010 Comcast/DSNP agreement was executed, DIRECTV announced that it had reached an agreement to resume carriage of Comcast’s Versus network. See DSNP Petition at 78; Armstrong Opposition at 61; Armstrong Proposed Findings of Fact at 77-78.

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may have caused Comcast to agree to pay higher rates for FSNP than it otherwise would in order to obtain favorable terms for DIRECTV's carriage of Comcast's networks.<sup>185</sup> For example, Armstrong's expert, Mr. Gardner, stated that:

The timing of the two agreements is consistent with my experience that a vertically-integrated programmer/distributor such as Comcast can link together deals in which it is selling programming (to an important distributor like DIRECTV) with deals in which Comcast is agreeing (as a cable distributor) to pay DIRECTV (or, here, its wholly owned subsidiary [DSNP]) for RSN programming. In such cases, Comcast is in a position to pay extra for the RSN programming – i.e., more than the market value – in order to effectively lower the price that DIRECTV is paying for Comcast's programming. This allows each of the programming/seller sides to state high rates in their contracts (and, thereby, build a record to artificially increase “market” rates), while in fact keeping the net effective rate low.<sup>186</sup>

In response, DSNP notes that [REDACTED]

].<sup>187</sup> Armstrong notes, however, that [REDACTED]

].<sup>188</sup> According to Armstrong, there is no evidence as to

[REDACTED]

].<sup>189</sup> Moreover, Armstrong contends that the evidence demonstrates that the

[REDACTED]

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<sup>185</sup> See Armstrong Opposition at 56 (“Comcast may well have decided internally or in discussions with DIRECTV's highest executives – *i.e.* those to which DSNP reports – to ‘give’ on rates to be paid for FSN Pittsburgh in exchange for concluding lucrative deals under which DIRECTV would carry Comcast's programming.”); *id.* at 59 (“An analysis of the potential impact of the intertwining interests on Comcast's stated rates is necessary before those rates can be considered a valid indicator of Fair Market Value.”); Armstrong Proposed Findings of Fact at 70.

<sup>186</sup> See Gardner Expert Report, CX-44 at 20-21; *see also* Siwek Rebuttal Expert Report, CX-47 at 7.

<sup>187</sup> See [REDACTED]

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<sup>188</sup> See Armstrong Opposition at 55, 61-62.

<sup>189</sup> *Id.* at 55; *see id.* at 62.

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].<sup>190</sup> According to DSNP, [REDACTED

].<sup>191</sup> [REDACTED

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37. We conclude that [REDACTED

] does not demonstrate that the rates in the Armstrong final offer are inconsistent with fair market value. As an initial matter, there is no dispute that Comcast will receive a discount relative to Armstrong based on the rates in the Armstrong final offer. Thus, the Armstrong final offer is consistent with the fundamental principle of marketplace negotiations for RSN programming that larger MVPDs will receive better rates.

38. While DSNP argues that [REDACTED ], we find the record to be inconclusive on this point. First, there is insufficient information in the record to determine what discount would be appropriate for Comcast given its size relative to Armstrong. There is no reliable evidence as to what discount Comcast received in prior years relative to Armstrong or what an “industry standard” discount would be for Comcast relative to Armstrong. Accordingly, there is no basis to assess whether a discount of [REDACTED ] is consistent with that past discount or with an “industry standard” discount.

39. Second, there is insufficient information in the record to determine what impact the simultaneous negotiations between Comcast (as a programmer) and DIRECTV (a distributor) had on the rates negotiated between Comcast (as a distributor) and DSNP. To the extent that a vertically integrated RSN (in this case, DSNP) puts forth its affiliation agreement with a vertically integrated MVPD (in this case, Comcast) as a comparable affiliation agreement for purposes of a fair market value analysis, we would expect the vertically integrated RSN to produce credible evidence that other simultaneous programming negotiations between the parties did not impact the rates in the agreement put forth as comparable. Here, the best evidence of the impact of these simultaneous negotiations would come from representatives of DSNP’s parent company (DIRECTV) who were involved in the negotiations with Comcast pertaining to DIRECTV’s carriage of Versus and the Comcast RSNs. To be sure, Armstrong did not name DIRECTV as a party to the arbitration, and DIRECTV declined to participate in discovery.<sup>193</sup> The salient issue here, however, is not whether DIRECTV should be compelled to come

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<sup>190</sup> See *id.* at 59-60; Armstrong Proposed Findings of Fact at 75-78. According to Armstrong, a number of documents demonstrate that the 2010 Comcast/DSNP Agreement was negotiated and drafted at the same time that Comcast was negotiating with DIRECTV (as distributor) to license the Comcast RSNs and Versus to DIRECTV. See Armstrong Opposition at 59-60; Armstrong Proposed Findings of Fact at 75-78. For example, Armstrong states that the evidence demonstrates that [REDACTED

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<sup>191</sup> See [REDACTED

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<sup>192</sup> See [REDACTED

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<sup>193</sup> Moreover, while the arbitrator issued a third-party subpoena to DIRECTV, DIRECTV did not comply with the subpoena and instead filed a Petition for Declaratory Ruling with the Commission asking the Commission to rule that third-party subpoenas are not permitted under the *Liberty Media Order* arbitration conditions. See *Public* (continued....)

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forward with evidence. Rather, the salient issue is whether DSNP has provided sufficient evidence to establish that the 2010 Comcast/DSNP Agreement is a comparable affiliation agreement for purposes of this arbitration by demonstrating whether or not the rates in that agreement were impacted by the simultaneous negotiations between Comcast and DSNP's parent, DIRECTV. Despite the importance of establishing the comparability of the 2010 Comcast/DSNP Agreement, DSNP's parent (DIRECTV) did not come forward to explain whether or not the rates in that agreement were impacted by the simultaneous negotiations between DIRECTV and Comcast (as a programmer). At the very least, **[REDACTED]**

]. Accordingly, even if there was evidence establishing that **[REDACTED]** ], we cannot rely dispositively on the rates in the 2010 Comcast/DSNP Agreement because there is not firm evidence establishing that these rates were not impacted by the simultaneous negotiations between Comcast and DIRECTV.<sup>194</sup>

**c. Conclusion**

40. Pursuant to the *Liberty Media Order* arbitration conditions, even if the final offers vary greatly from what we believe to be the actual fair market value, we must select the final offer that “most closely approximates the fair market value of the programming carriage rights at issue.”<sup>195</sup> Here, the record establishes the fundamental principle of marketplace negotiations for RSN programming that an MVPD that has a larger number of subscribers and generates more revenue for an RSN will obtain better rates, terms, and conditions for carriage of the RSN than an MVPD that has fewer subscribers and generates less revenue. The Armstrong final offer is consistent with this principle: Armstrong will pay lower rates than MVPDs that have fewer subscribers and that generate less revenue for DSNP than Armstrong. Moreover, Armstrong's historical benchmark analysis demonstrates that Armstrong has not historically paid the same or higher rates than all other Cohort Affiliates that have fewer subscribers and generate less revenue than Armstrong. Without any justification, the DSNP final offer violates this principle: even assuming “normalized” rate calculations that favor DSNP and considering only a select group of Cohort Affiliates put forth by DSNP, Armstrong would pay higher rates than MVPDs that have fewer subscribers and that generate less revenue for DSNP than Armstrong. Moreover, for the reasons discussed above, we conclude that neither of the methodologies put forth by DSNP – either its averaging methodology or its PSPPE analysis – is probative of fair market value. Given this choice, we find that the rates in the Armstrong final offer “most closely approximate the fair market value of the programming carriage rights at issue.”

**2. Analysis of Other Rate Terms**

41. In addition to the difference in the rates proposed, the DSNP and Armstrong final offers differ with respect to other rate terms – *i.e.*, the renewal rate increase, the annual escalator, the timing of the annual escalator, and the number of games to be provided. In this section, we assess each of these

(Continued from previous page) \_\_\_\_\_  
*Notice, Joint Petition for Declaratory Ruling that the Liberty Order Does Not Authorize Third-Party Subpoenas*, 26 FCC Rcd 411 (MB 2011).

<sup>194</sup> Because we find that the factors discussed in paragraphs 37-39 are sufficient to negate any claim that Comcast's rates for FSNP demonstrate that Armstrong's proposed rates are inconsistent with fair market value, we need not consider the remaining factors set forth by Armstrong for distinguishing Comcast's rates.

<sup>195</sup> See *Liberty Media Order*, 23 FCC Rcd at 3348, Appendix B, Condition IV, § C “Review of Final Award by the Commission,” ¶ 3.

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other rate terms and their impact on the fair market value analysis. We conclude that, on balance, these other rate terms favor the Armstrong final offer as being more consistent with fair market value.

**a. Renewal Rate Increase**

42. The record reflects that RSNs at renewal try to obtain an increase in the rates the MVPD was paying at the end of the previous affiliation agreement (known as a “renewal rate increase” or “rate reset”).<sup>196</sup> Armstrong’s expert, Mr. Gardner, testified that a renewal rate increase is typically in the range of [REDACTED], often reflecting an increase in the RSN’s costs resulting from new rights agreements signed with sports teams.<sup>197</sup>

43. The parties disagree on how the renewal rate increase should be calculated here. Armstrong notes that its rates increased by [REDACTED] in the 15 months prior to the [REDACTED] expiration of the 2005 Armstrong/FSNP Agreement.<sup>198</sup> First, in [REDACTED], Armstrong agreed to an HD Surcharge (amounting to a [REDACTED] rate increase) to carry the full-time HD feed of FSNP.<sup>199</sup> Second, in [REDACTED], three months prior to the expiration of the 2005 Armstrong/FSNP Agreement, Armstrong agreed to a surcharge (amounting to approximately a [REDACTED] rate increase) to carry 36 additional Pirates games.<sup>200</sup> In fact, Armstrong informed DSNP that the rate increases due to HD

<sup>196</sup> See Gardner Expert Report, CX-44 at 23-24; Gardner Test., Hr’g Tr. at Tr. 348-50.

<sup>197</sup> See Gardner Expert Report, CX-44 at 23; see also Gardner Test., Hr’g Tr. at 352, 493.

<sup>198</sup> See Armstrong Opposition at 18 (citing Gardner Expert Report, CX-44 at 30).

<sup>199</sup> When Armstrong executed the 2005 Armstrong/FSNP Agreement, Armstrong also executed an HD Events Agreement pursuant to which FSNP agreed to provide [REDACTED] Pittsburgh Pirates games and [REDACTED] Pittsburgh Penguins games to Armstrong in HD, but only for the period from [REDACTED]

J. See Letter Agreement between Armstrong Utilities, Inc. and Fox Sports Net Pittsburgh LLC ([REDACTED]), JX-15 at 6, Schedule 1 (“[REDACTED] Armstrong/FSNP HD Events Agreement”). The [REDACTED] Armstrong/FSNP HD Events Agreement expired on [REDACTED]. See *id.* DSNP launched a full-time HD feed in early 2009, which Armstrong agreed to carry in [REDACTED] for a [REDACTED] surcharge. See Ross Test., Hr’g Tr. at 201, 205; see also First Addendum to the Affiliation Agreement between Armstrong Utilities Inc. and Fox Sports Net Pittsburgh, LLC, JX-38 ([REDACTED]) (“[REDACTED] Armstrong/FSNP HD Addendum”); Armstrong Proposed Findings of Fact at 14-15; DSNP Proposed Findings of Fact at 14.

<sup>200</sup> On September 11, 2009, DSNP offered Armstrong an additional 36 Pirates games for a surcharge. See Letter from Dale Albright, Director, Affiliate Relations, DSNP to Jeffrey Ross, President, Armstrong Utilities, Inc., (September 11, 2009), CX-26 (“Sept. 2009 Pirates Offer”). In reply, Armstrong offered to formally start renewal negotiations because it felt that the additional games should be a part of its renewal. See Ross Test., Hr’g Tr. at 148-52; see also Letter from David Wittmann, VP of Cable Marketing, Armstrong to Dale Albright, Director, Affiliate Relations, DSNP (December 3, 2009), CX-25. After DSNP renegotiated its agreement with the Pirates in March 2010, it again offered Armstrong the right to distribute an additional 36 Pirates games on a surcharge basis, beginning with the 2010 MLB season. See DSNP Petition at 24 (citing Ross Test., Hr’g Tr. at 143; Gardner Test., Hr’g Tr. at 475-76; Wyche Test., Hr’g Tr. at 918-19). In [REDACTED], Armstrong agreed to this additional surcharge. See DSNP Petition at 25 (citing Additional Events Addendum between Armstrong Utilities, Inc. and Fox Sports Net Pittsburgh LLC ([REDACTED]), JX-39 (“[REDACTED] Armstrong/DSNP Additional Events Addendum”)); see also Ross Test., Hr’g Tr. at 210. Armstrong notes that the “additional games” it would receive were in fact games that it had distributed in previous seasons and included critical games, such as the Opening Day game and numerous early season games, that it could not afford to decline without the risk of losing subscribers. See Gardner Expert Report, CX-44 at 29; Ross Test., Hr’g Tr. at 158-63; Armstrong Proposed Findings of Fact at 15. Armstrong argues that this reflects DSNP’s strategy to force Armstrong to accept an early rate reset under pressure of losing critical games. See Gardner Expert Report, CX-44 at 28-29; Ross Test., Hr’g Tr. at 163-64.

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programming and the additional Pirates games were more appropriate for renewal discussions.<sup>201</sup> Armstrong's expert, Mr. Gardner, testified that the standard renewal rate increase of [REDACTED] is premised on the RSN offering an "improved and enhanced channel" that is not reflected in old rates.<sup>202</sup> Armstrong argues that the [REDACTED] rate increase it agreed to in the previous 15 months already reflected the improvements in FSNP.<sup>203</sup> Armstrong contends that the rates it was paying as of [REDACTED] were fully reflective of the surcharges and the fair market value of FSNP.<sup>204</sup> Accordingly, Armstrong argues that there is no basis for it to pay a standard renewal rate increase of [REDACTED] on top of the [REDACTED] rate increase it already agreed to during the previous 15 months.<sup>205</sup> Rather, as summarized in Table B below, the renewal rate increase excluding the surcharges under the Armstrong final offer would range from [REDACTED] to [REDACTED] depending on the zone. When the surcharges are included in calculating the renewal rate increase under the Armstrong final offer, the increase ranges from [REDACTED] to [REDACTED] depending on the zone.

44. DSNP argues that there is no basis for Armstrong to calculate a renewal rate increase by including surcharges that it voluntarily agreed to prior to the expiration of the 2005 Armstrong/FSNP Agreement.<sup>206</sup> When the surcharges are excluded, DSNP notes that Armstrong's proposed [REDACTED] to [REDACTED] renewal rate increase [REDACTED]

[REDACTED].<sup>207</sup> The renewal rate increase excluding the surcharges under the DSNP final offer would range from [REDACTED]

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<sup>201</sup> See Armstrong Opposition at 17 (citing Ross Test., Hr'g Tr. at 138-39, 140-41, 147-48; Letter from Jeffrey Ross, President, Armstrong to Dale Albright, Director, Affiliate Relations, DSNP (Feb. 9, 2009), CX-9 ("Armstrong Feb. 2009 Letter")); Armstrong Proposed Findings of Fact at 14-15.

<sup>202</sup> See Armstrong Opposition at 18, 24 (citing Gardner Test., Hr'g Tr. at 492-93).

<sup>203</sup> See *id.* at 18 (citing Gardner Test., Hr'g Tr. at 318-19, 475-77, 487-93). Armstrong objected to DSNP's pressure to accept a surcharge. See *id.* at 51 (citing Ross Test., Hr'g Tr. at 134-38, 142, 148-49, 156, 160-162; Email from Jeffrey A. Ross, President, Armstrong to Dale Albright, Director, Affiliate Relations, DSNP (March 9, 2010), CX-21; Gardner Expert Report, CX-44 at 11-12, 27-30). Armstrong claims that, although it agreed to the [REDACTED] rate increase resulting from the surcharges, it expressed to DSNP its position that it should not be subject to another [REDACTED] renewal reset absent an increase in the value of the programming. See *id.* at 51-52 (citing Armstrong Pre-Hearing Brief at 15-17; Armstrong Feb. 2009 Letter, CX-9; Sept. 2009 Pirates Offer, CX-26; Ross Test., Hr'g Tr. at 147-48); Armstrong Proposed Findings of Fact at 15.

<sup>204</sup> See Armstrong Opposition at 17 (citing Wyche Rebuttal Expert Report, RX-64 at 8-9; Ross Test., Hr'g Tr. at 143-63).

<sup>205</sup> See *id.* at 17-18; Armstrong Proposed Findings of Fact at 16 (stating that "DSNP's double-dipping was not justified") and at 42-43; Gardner Expert Report, CX-44 at 25, 27-30; Gardner Test., Hr'g Tr. at 475-77, 492-93.

<sup>206</sup> See DSNP Petition at 33, 46 (citing Ross Test., Hr'g Tr. at 172-73, 206-07). DSNP argues that the surcharges were appropriate increases for additional services provided during the term of the 2005 Armstrong/FSNP Agreement. For example, DSNP notes that Armstrong had accepted the [REDACTED] Armstrong/FSNP HD Addendum more than 15 months before the 2005 Armstrong/FSNP Agreement expired on [REDACTED]. See *id.* at 47 (citing 2009 Armstrong/FSNP HD Addendum, JX-38; Ross Test., Hr'g Tr. at 140, 205-06); see also DSNP Proposed Findings of Fact at 13, 20. In addition, DSNP notes that Armstrong agreed to the surcharges through executed addenda to the 2005 Armstrong/FSNP Agreement and admitted that they were implemented in accordance with the terms of that agreement. See DSNP Petition at 48 (citing Ross Test., Hr'g Tr. at 207, 210-12); DSNP Proposed Findings of Fact at 16, 20.

<sup>207</sup> See DSNP Reply at 30-31 and Exhibit 1; DSNP Proposed Findings of Fact at 20-21.

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].<sup>208</sup> When the surcharges are included in calculating the renewal rate increase under the DSNP final offer, the increase ranges from [REDACTED] depending on the zone, which is [REDACTED].

**Table B**

Comparison of Final Offer Rate Increases at Renewal <sup>209</sup>							
Zone	Armstrong Rates on Expiration of 2005 Agreement	DSNP Final Offer			Armstrong Final Offer		
		Rate	% Increase Without Surcharges	% Increase With Surcharges	Rate	% Increase Without Surcharges	% Increase With Surcharges
1	[Redacted] <sup>210</sup>	[Redacted]	[Redacted]	[Redacted]	[Redacted] <sup>211</sup>	[Redacted]	[Redacted]
2	[Redacted]	[Redacted]	[Redacted]	[Redacted]	[Redacted]	[Redacted]	[Redacted]
4	[Redacted]	[Redacted]	[Redacted]	[Redacted]	[Redacted]	[Redacted]	[Redacted]

45. Armstrong contends that DSNP's proposed renewal rate increase is inconsistent with the renewal rate increase negotiated by [REDACTED].<sup>212</sup> [REDACTED] affiliation agreement with DSNP expired on [REDACTED].<sup>213</sup> After DSNP offered the additional Pirates games to its affiliates in September 2009, DSNP and [REDACTED] reached a renewal agreement in [REDACTED].<sup>214</sup> The charges for the additional programming were incorporated into the rates in the renewal agreement,<sup>215</sup> and those rates increased by [REDACTED] to [REDACTED] (depending on the

<sup>208</sup> See DSNP Petition at 45; DSNP Proposed Findings of Fact at 20; see also Gardner Test., Hr'g Tr. at 494-97. DSNP argues that this is also consistent with the renewal rate increase of [REDACTED] to [REDACTED] between the 2005 Armstrong/FSNP Agreement and the previous Armstrong deal with FSNP. See DSNP Petition at 20.

<sup>209</sup> See DSNP Petition at 45; DSNP Proposed Findings of Fact at 19-20; Wyche Rebuttal Expert Report, RX-64 at 9, Table 2; Gardner Expert Report, CX-44 at 30-32, Charts 2-3; see also Siwek Test., Hr'g Tr. at 812-14.

<sup>210</sup> See Siwek Rebuttal Expert Report, CX-47 at Appendix A, Revised Chart 2 and Appendix B, Rebuttal Chart 1a; Siwek Test., Hr'g Tr. at 804-10. The Zone [REDACTED] rate reflects [REDACTED] which were weighted to account for subscribers in each zone. See Siwek Rebuttal Expert Report, CX-47 at Appendix A, Revised Chart 2. These values are identical up through the fourth decimal point to the blended rate for Zone [REDACTED] calculated by DSNP's expert, Mr. Wyche. See Siwek Test., Hr'g Tr. at 808; Wyche Rebuttal Expert Report, RX-64 at 9; see also DSNP Proposed Findings of Fact at 17, 19.

<sup>211</sup> This rate represents the weighted average of the rates applicable to Zones [REDACTED] and [REDACTED] in the Armstrong final offer, as calculated by Armstrong's expert, Mr. Siwek. See Siwek Rebuttal Expert Report, CX-47 at Appendix A, Chart 1; Siwek Test., Hr'g Tr. at 811-12.

<sup>212</sup> See Armstrong Opposition at 52-53.

<sup>213</sup> See DSNP Reply at 30 n.24; [REDACTED] Agreement, JX-165 at DSNP 001916, § 3.

<sup>214</sup> See DSNP Reply at 30 n.24; [REDACTED] Agreement, JX-167 at DSNP 002119.

<sup>215</sup> Mr. Wyche, DSNP's expert, admitted that he did not know how much [REDACTED] had been willing to pay for the HD feed and the additional Pirates games because the surcharges were "baked" into the rates in the (continued....)

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zone) from the rates in [REDACTED] previous affiliation agreement.<sup>216</sup> In contrast, the DSNP final offer would have Armstrong pay the [REDACTED] surcharge for the additional programming, plus a standard renewal rate increase.<sup>217</sup> Thus, Armstrong claims that DSNP wants Armstrong to pay twice for the same improvements for which [REDACTED] paid only once.<sup>218</sup> DSNP responds that the annual rate increase in [REDACTED] renewed affiliation agreement ranged from [REDACTED] to [REDACTED] depending on the zone between 2009 (when [REDACTED] did not have the additional games) and 2010 (when [REDACTED] acquired the rights to the games), which it states “clearly reflect[s] the charges for the additional games.”<sup>219</sup>

46. *Discussion.* We conclude that Armstrong’s proposed renewal rate increase is more consistent with fair market value than that proposed by DSNP. The record reflects that renewal rate increases are intended to reflect improvements in the service,<sup>220</sup> which Armstrong paid for in the form of a [REDACTED] rate increase [REDACTED] prior to the expiration of the 2005 Armstrong/FSNP Agreement as well as a [REDACTED] increase [REDACTED] prior to expiration.<sup>221</sup> Adding a standard renewal rate increase on top of these recent surcharges would effectively charge Armstrong twice for these improvements.<sup>222</sup> Our conclusion is further supported by DSNP’s treatment of [REDACTED], which was not required to pay both a surcharge for additional games and a renewal rate increase when it renewed its affiliation agreement [REDACTED]. While DSNP claims that [REDACTED] paid for the additional programming [REDACTED], the only

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[REDACTED] renewed affiliation agreement. *See* Wyche Test., Hr’g Tr. at 1020-21; Chart: FSN Pittsburgh Subscriber Counts by Zone, JX-208; *see also* Armstrong Opposition at 48, 79; Armstrong Proposed Findings of Fact at 54; DSNP Reply at 30 n.24.

<sup>216</sup> *See* DSNP Reply at Exhibit 1; *see also* DSNP Petition at 97; Armstrong Opposition at 52 (citing Chart: FSN Pittsburgh Subscriber Counts by Zone, JX-208; Wyche Test., Hr’g Tr. at 1020-21).

<sup>217</sup> *See supra* Table B.

<sup>218</sup> *See* Armstrong Opposition at 53.

<sup>219</sup> *See* DSNP Reply at 30 n.24; [REDACTED].

<sup>220</sup> *See* Gardner Test., Hr’g Tr. at 492-93; *see also* Armstrong Opposition at 7-8, 18.

<sup>221</sup> As discussed above, although Armstrong agreed to the surcharges during the term of its previous affiliation agreement, it expressed concern regarding the potential of having to pay another increase at renewal. *See supra* n.203.

<sup>222</sup> DSNP claims that accepting Armstrong’s argument that the surcharges agreed to during the previous contract term should be included in the renewal rate increase would violate the Media Bureau’s holding in *Fox/Massillon* that the Commission’s arbitration conditions do not apply to disputes arising under ongoing carriage agreements. *See* DSNP Petition at 49; DSNP Reply at 30-31; *see also* *Fox Sports Net Ohio, LLC v. Massillon Cable TV, Inc.*, Order on Review, 25 FCC Rcd 16054, 16059, ¶ 8 (MB 2010) (“*Fox/Massillon*”). We disagree. The “threshold question at issue” in *Fox/Massillon* was whether the MVPD “properly invoked the arbitration condition under the terms of the *News Corp.-Hughes Order* before its existing carriage agreement . . . had expired.” *See* *Fox/Massillon*, 25 FCC Rcd at 16059, ¶ 9. There is no dispute here that Armstrong filed for arbitration in accordance with the terms of the *Liberty Media Order* arbitration conditions. Moreover, as presented here, the issue of whether the surcharges agreed to during the previous contract term should be included in the rate renewal increase is not a dispute regarding an ongoing carriage agreement. Rather, this is one factor relevant to the fair market value analysis of the carriage rights for FSNP.

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support DSNP provides for this assertion is to cite to the [REDACTED] ].<sup>223</sup> DSNP cites no testimony or other evidence supporting this assertion.

**b. Annual Escalator**

47. The record reflects that RSN affiliation agreements typically include provisions specifying annual rate increases (also known as “annual escalators”), which range from [REDACTED] (according to Armstrong)<sup>224</sup> or [REDACTED] (according to DSNP).<sup>225</sup> Armstrong notes that its final offer provides for annual rate increases of [REDACTED] in 2011, [REDACTED] in 2012, [REDACTED] in 2013, and [REDACTED] in 2014, all of which fall within what it claims to be the typical range of [REDACTED] ].<sup>226</sup> DSNP responds that this amounts to an average annual escalator of [REDACTED], which is at the low end of the typical range put forth by Armstrong, whereas the DSNP final offer provides for an annual increase of approximately [REDACTED], which is in the middle of the typical range put forth by Armstrong.<sup>227</sup> In addition, DSNP argues that this [REDACTED] annual escalator is consistent with (i) the escalators in its recently negotiated marketplace renewals with [REDACTED] ];<sup>228</sup> and (ii) [REDACTED] ].<sup>229</sup>

<sup>223</sup> See DSNP Reply at 30 n.24 (citing [REDACTED] ) and 51 n.34 (same).

<sup>224</sup> See Gardner Expert Report, CX-44 at 24; Gardner Rebuttal Expert Report, CX-48 at 12-13; Gardner Test., Hr’g Tr. at 351, 421.

<sup>225</sup> According to Mr. Wyche, DSNP’s expert, escalators for RSNs are typically in the [REDACTED] ] range, and a reasonable range would be [REDACTED] ]. See DSNP Petition at 52 (citing Wyche Rebuttal Expert Report, RX-64 at 12-13; Wyche Test., Hr’g Tr. at 903); DSNP Proposed Findings of Fact at 23. In addition, DSNP produced rate cards for 15 Fox RSNs for 2008 through 2012 and summarized the escalators in 92 zones, which revealed that the escalator in 85 percent of the zones was [REDACTED] ]. See DSNP Petition at 52 (citing Wyche Rebuttal Expert Report, RX-64 at 12; Chart: FSN Escalator Summary, RX-69; Wyche Test., Hr’g Tr. at 899-900); DSNP Proposed Findings of Fact at 22-23. Armstrong argues that these rate cards are entitled to no weight because, among other things, no fact witness testified as to what they represent and there is no explanation of whether the rates listed are actual rates, targets rates, average rates, or some other form of rates. See Armstrong Opposition at 20.

<sup>226</sup> See Armstrong Opposition at 19 (citing Armstrong Final Offer, JX 33 at ARMSTRONG 005695-96, § 8(a)(i); Ross Test., Hr’g Tr. 173-74).

<sup>227</sup> See DSNP Petition at 51 (citing Wyche Test., Hr’g Tr. at 897-98; Thompson Test., Hr’g Tr. at 1283); DSNP Proposed Findings of Fact at 21-22.

<sup>228</sup> See DSNP Petition at 51 n.35; DSNP Proposed Findings of Fact at 21; Exhibit F: Comparison of FSN Pittsburgh Annual Growth Rates for Zones 1, 2 and 4 Reflected in Recently Renewed Affiliate Agreements, RX-56; Ross Test., Hr’g Tr. at 895-99. Armstrong’s President, Mr. Ross, testified that the annual escalators contained in the Armstrong final offer were “on the high side compared to other deals that we were doing at the time.” See Ross Test., Hr’g Tr. at 174-75. DSNP, however, argues that the annual escalators in Armstrong’s agreements with three other RSNs ranged from [REDACTED] to [REDACTED], with escalators in six out of ten zones at [REDACTED] ]. See DSNP Petition at 53 (citing Chart: Percentage Rate Increases for Other RSNs Distributed by Armstrong, RX-73; Wyche Test., Hr’g Tr. at 901-03); DSNP Proposed Findings of Fact at 24-25. In addition, Armstrong’s affiliation agreement with [REDACTED] ] provides for a [REDACTED] annual rate increase. See DSNP Petition at 53 (citing Ross Test., Hr’g Tr. at 226-30); DSNP Proposed Findings of Fact at 24-25.

<sup>229</sup> See DSNP Petition at 51; DSNP Proposed Findings of Fact at 21; Tucker Test., Hr’g Tr. at 1092.

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48. *Discussion.* We conclude that DSNP's proposed annual escalator most closely approximates fair market value. While we might expect Armstrong to negotiate an annual escalator lower than the [REDACTED] escalator negotiated by [REDACTED] ] based on Armstrong's greater value to DSNP, we find no basis in the record to conclude that this escalator should be as low as [REDACTED], especially considering that the record evidence indicates that Armstrong has negotiated higher annual escalators with other RSNs.<sup>230</sup>

**c. Timing of the Annual Escalator**

49. The parties dispute when the annual escalator should take effect. According to Armstrong, the industry norm is for the annual escalator to take effect on the anniversary date of the affiliation agreement so that the rate year coincides with the contract year.<sup>231</sup> Consistent with this norm, the Armstrong final offer proposes a rate increase on [REDACTED] of each year, the anniversary date of the affiliation agreement.<sup>232</sup> This results in four annual rate increases during the five-year term of the agreement: [REDACTED], 2011; [REDACTED], 2012; [REDACTED], 2013; and [REDACTED], 2014.<sup>233</sup> DSNP argues that the annual escalator in all of its affiliation agreements takes effect on [REDACTED].<sup>234</sup> Consistent with this practice, the DSNP final offer proposes a rate increase on [REDACTED] of each year.<sup>235</sup> DSNP also notes that Armstrong agreed to a [REDACTED] annual escalator date in the 2005 Armstrong/FSNP Agreement despite that agreement having a [REDACTED] anniversary date.<sup>236</sup> A [REDACTED] annual escalator date as proposed by DSNP results in five annual rate increases during the five-year term of the agreement: [REDACTED], 2011; [REDACTED], 2012; [REDACTED], 2013; [REDACTED], 2014; and [REDACTED], 2015.<sup>237</sup> This extra annual increase would result in Armstrong paying an additional [REDACTED] to DSNP compared to Armstrong's final offer.<sup>238</sup>

50. *Discussion.* We conclude that Armstrong's proposal to have its annual escalator take effect on the [REDACTED] anniversary date of the affiliation agreement most closely approximates fair market value. While DSNP notes that the annual escalator in its affiliation agreements with the Cohort Affiliates takes effect on [REDACTED], the evidence submitted by DSNP indicates that this is also the anniversary date of each of these agreements.<sup>239</sup> Thus, consistent with Armstrong's final offer, DSNP's

<sup>230</sup> See *supra* n.228.

<sup>231</sup> See Armstrong Opposition at 19; Gardner Expert Report, CX-44 at 32-33; Gardner Test., Hr'g Tr. at 350-51; Ross Test., Hr'g Tr. at 121, 176.

<sup>232</sup> See Armstrong Final Offer, JX-33 at ARMSTRONG 005695-96, § 8(a)(i).

<sup>233</sup> See Gardner Expert Report, CX-44 at 32; Ross Test., Hr'g Tr. at 175-76.

<sup>234</sup> See DSNP Reply at 61 n.50 and Exhibit 1.

<sup>235</sup> See DSNP Final Offer, JX-34 at DSNP 015081, Exhibit C.

<sup>236</sup> See DSNP Petition at 55; DSNP Proposed Findings of Fact at 25; 2005 Armstrong/FSNP Agreement, JX-1 at ARMSTRONG 000006-7, § 6(a)(i).

<sup>237</sup> See Armstrong Proposed Findings of Fact at 17; Gardner Expert Report, CX-44 at 32-33

<sup>238</sup> See Armstrong Proposed Findings of Fact at 17; Gardner Expert Report, CX-44 at 32-33.

<sup>239</sup> See DSNP Reply at Exhibit 1; [REDACTED] anniversary date) and [REDACTED] ] escalator date); [REDACTED] ] at [REDACTED] anniversary date and [REDACTED] escalator date); [REDACTED] ] anniversary date) and [REDACTED] ] escalator date); see also [REDACTED] ] anniversary date and stating that "A (continued....)

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practice is to have the rate year coincide with the contract year. While the Armstrong final offer differs from other DSNP affiliation agreements in that its anniversary date is [REDACTED] rather than [REDACTED], we find no basis in industry practice or in DSNP's past practices to impose a unique requirement on Armstrong to pay an "annual" rate increase just [REDACTED] months after its agreement begins, nor to impose an additional annual increase on Armstrong that other comparable affiliates do not incur.<sup>240</sup> While Armstrong was willing to agree to a [REDACTED] annual escalator in the 2005 Armstrong/FSNP Agreement based on the particular facts of that negotiation, this does not lead us to believe that fair market value dictates that Armstrong must agree to the same annual escalator date in all future affiliation agreements when the evidence overwhelmingly reveals that this would not be consistent with industry practice.<sup>241</sup>

**d. Number of Games**

51. DSNP argues that the Armstrong final offer, unlike the DSNP final offer, would not require DSNP to provide all of the Pirates and Penguins games that Armstrong was receiving at the expiration of the 2005 Armstrong/FSNP agreement (approximately [REDACTED] Pirates games and [REDACTED] Penguins games, or [REDACTED] games in total).<sup>242</sup> Rather, DSNP notes that the Armstrong final offer contains a "minimum content" provision that requires DSNP to deliver only [REDACTED] Pirates games and [REDACTED] Penguins games ([REDACTED] games in total).<sup>243</sup> DSNP contends that the allegedly low rates in the Armstrong final offer reflect this reduced number of games, but that Armstrong nonetheless expects to receive the full complement of [REDACTED] Pirates games and [REDACTED] Penguins games.<sup>244</sup> In response, Armstrong argues that the "minimum content" provision does not affect the number of games it will receive.<sup>245</sup> According to Armstrong, the

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 'Contract Year' means each 12 month period during the Term commencing [REDACTED] and ending on [REDACTED] and [REDACTED] [REDACTED] escalator date).

<sup>240</sup> To be sure, the record indicates that DSNP has current affiliation agreements with MVPDs that have a mid-year anniversary date and a January 1 annual escalator date, but these agreements are with small MVPDs that are not probative in assessing fair market value here. *See, e.g.,* [REDACTED]

[REDACTED] [REDACTED] anniversary date) and [REDACTED] [REDACTED] escalator date); [REDACTED] [REDACTED] anniversary date) and

[REDACTED] [REDACTED] anniversary date) and [REDACTED] [REDACTED] (January 1 escalator date); *see also* Chart: FSN Pittsburgh Subscriber Counts by Zone, JX-208 (stating the [REDACTED] [REDACTED] has a total of [REDACTED] subscribers and [REDACTED] [REDACTED] has a total of [REDACTED] subscribers).

<sup>241</sup> *See* Ross Test., Hr'g Tr. at 115-18; Gardner Expert Report, CX-44 at 32-33.

<sup>242</sup> *Compare* DSNP Final Offer, JX-34 at DSNP 015055, §5(d) with Armstrong Final Offer, JX-33 at ARMSTRONG 005702, § 8(k)(i); *see also* DSNP Petition at 28; DSNP Proposed Findings of Fact at 61-64.

<sup>243</sup> *See* DSNP Petition at 28; DSNP Reply at 51; DSNP Proposed Findings of Fact at 62; *see also* Armstrong Final Offer, JX-33 at ARMSTRONG 005702, § 8(k)(i); Siwek Expert Report, CX-46 at 4 n.4 ("The Final Offers differ as to the minimum number of such professional events that will be guaranteed each year.").

<sup>244</sup> *See* DSNP Petition at 31-32; DSNP Reply at 51-52; DSNP Proposed Findings of Fact at 64; *see also* Gardner Rebuttal Expert Report, CX-48 at 9 (stating that "Armstrong's Final Offer states that the 137 Pirates games is only a 'minimum content' requirement" and that "DSNP is free to provide more games if it chooses"); Armstrong Proposed Findings of Fact at 19 ("Under Armstrong's Final Offer, DSNP can deliver more than the minimum threshold number of games, as it has in the past."); Ross Test., Hr'g Tr. at 178, 252 (Armstrong's President, Mr. Ross, stating that Armstrong expects to receive the same number of games as the prior year).

<sup>245</sup> *See* Armstrong Opposition at 20-21; Armstrong Proposed Findings of Fact at 19; *see also* Gardner Test., Hr'g Tr. at 373 (agreeing that the Armstrong final offer seeks the entirety of the service of FSNP). For example, the (continued....)

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“minimum content” provision establishes only the point at which DSNP owes Armstrong a rebate due to a shortfall in games.<sup>246</sup> While the number of games stated in the DSNP final offer is greater than the number stated in the Armstrong final offer, the DSNP final offer provides DSNP with a [REDACTED] shortfall allowance before the rebate is triggered.<sup>247</sup> Thus, Armstrong argues that the final offers guarantee virtually the same number of games before a shortfall is triggered.<sup>248</sup>

52. *Discussion.* We conclude that the Armstrong final offer and the DSNP final offer both require DSNP to provide Armstrong with the full complement of Pirates games and Penguins games. Thus, we reject DSNP’s claim that the rates in the Armstrong final offer reflect a reduced number of games relative to what Armstrong was receiving at the expiration of the 2005 Armstrong/FSNP agreement. The definitions of the terms “Service” and “Delivery and Content” clearly indicate that the Armstrong final offer requires DSNP to provide Armstrong with the full complement of Pirates games and Penguins games. We also find that the “minimum content” provision is relevant for purposes of determining whether Armstrong is entitled to a rebate for a shortfall in games, but this provision does not mean that Armstrong is purchasing access to fewer games than other DSNP affiliates. This is supported by testimony from DSNP’s expert, Mr. Wyche, who stated that all DSNP affiliates received the same number of games in 2009 (depending on whether they accepted a surcharge) despite the variation in “minimum content” provisions in the DSNP affiliation agreements.<sup>249</sup>

**e. Conclusion**

53. With the exception of the annual escalator, we conclude that the other rate terms discussed above favor the Armstrong final offer as being more consistent with fair market value. We do not believe that Armstrong’s annual escalator tips the scales in favor of finding that the DSNP final offer most closely approximates fair market value considering that the (i) DSNP final offer would require Armstrong to pay higher rates than MVPDs with fewer subscribers and that generate less revenue for DSNP; (ii) neither of the methodologies put forth by DSNP is probative of fair market value; and (iii) on balance, the other rate terms and non-rate terms favor the Armstrong final offer as being more consistent with fair market value.<sup>250</sup>

**3. Analysis of Non-Rate Terms**

54. The DSNP and Armstrong final offers also differ with respect to certain non-rate terms. In this section, we assess each of these non-rate terms and their impact on the fair market value analysis. We conclude that, on balance, these non-rate terms favor the Armstrong final offer as being more consistent with fair market value.

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Armstrong final offer defines the “Service” that Armstrong is licensing as the [REDACTED]

J. See Armstrong Final Offer, JX-33 at ARMSTRONG 005686, § 1(k) (definition of “Service”); see also Armstrong Opposition at 20-21; Armstrong Proposed Findings of Fact at 18. Moreover, the Armstrong final offer provides that [REDACTED]

I. See Armstrong Final Offer, JX-33 at ARMSTRONG 005689, § 4(a) (“Delivery and Content”).

<sup>246</sup> See Armstrong Opposition at 21; Armstrong Proposed Findings of Fact at 19; see also Gardner Test., Hr’g Tr. at 374-75; Armstrong Final Offer, JX 33 at ARMSTRONG 005702-03, § 8(k)(ii).

<sup>247</sup> See Armstrong Opposition at 22, 25; Armstrong Proposed Findings of Fact at 19-20, 61; see also Gardner Test., Hr’g Tr. at 380-81; DSNP Final Offer, JX-34 at DSNP 015055-56, § 5(d)(i)-(ii).

<sup>248</sup> See Armstrong Opposition at 22; Armstrong Proposed Findings of Fact at 20.

<sup>249</sup> See Armstrong Opposition at 21; Armstrong Proposed Findings of Fact at 20; Wyche Test., Hr’g Tr. at 1063-65.

<sup>250</sup> See *supra* § III.C.2 (other rate terms) and *infra* § III.C.3 (non-rate terms).

**REDACTED VERSION – RELEASED AUGUST 31, 2011****a. Use of [REDACTED] Games to Cure Shortfalls**

55. The final offer proposed by DSNP would allow DSNP to cure any shortfall in Pirates or Penguins games by substituting [REDACTED] games.<sup>251</sup> Armstrong’s expert, Mr. Gardner, states that [REDACTED] games are far less valuable than Penguins or Pirates games.<sup>252</sup> The ability to substitute [REDACTED] games does not appear in DSNP’s affiliation agreements with [REDACTED].<sup>253</sup> DSNP notes, however, that this provision was taken directly from its recent renewal agreement with [REDACTED].<sup>254</sup> In addition, DSNP notes that the 2005 Armstrong/FSNP Agreement, as well as Armstrong’s current affiliation agreement with [REDACTED], allows for the substitution of [REDACTED] to cure a shortfall.<sup>255</sup> Moreover, DSNP argues that any harm resulting from this provision is speculative, particularly given that (i) a shortfall is highly unlikely given that DSNP’s rights agreements do not expire until [REDACTED] (Penguins) and [REDACTED] (Pirates) and those agreements require it to televise at least [REDACTED] Pirates games and [REDACTED] Penguins games; and (ii) there is no [REDACTED] team currently in Pittsburgh nor are there any plans to establish one.<sup>256</sup>

56. *Discussion.* Given the absence of a similar provision in all but one of the other Cohort Affiliates’ affiliation agreements, we conclude that the provision in the DSNP final offer allowing for the substitution of MLS games to cure a shortfall does not “most closely approximate fair market value.” We do not find dispositive the fact that [REDACTED] has agreed to this provision considering that Armstrong is larger than [REDACTED] in terms of both subscribers and revenues generated.

**b. Rebate for Shortfalls in Professional Games**

57. The rebate provisions for shortfalls in professional games in the Armstrong and DSNP final offers differ in two respects: (i) the rebate trigger; and (ii) the rebate formula. With respect to the rebate trigger, the parties dispute whether their respective rebates are triggered by a shortfall in the aggregate number of games or a shortfall in the games of individual professional teams. For example, DSNP notes that the Armstrong final offer states that the “Pirates Baseline” ([REDACTED] regular

<sup>251</sup> Armstrong’s expert, Mr. Gardner, stated that because the DSNP final offer defines “Professional Events” to include [REDACTED] games, its “Right to Cure” provision effectively permits it to substitute [REDACTED] games for Penguins and Pirates games without incurring any obligation to pay rebates. *See* Gardner Expert Report, CX-44 at 41 (citing DSNP Final Offer, JX-34 at DSNP 015055, § 5(d)(i)).

<sup>252</sup> *See* Armstrong Opposition at 70 (citing Gardner Test., Hr’g Tr. at 391-92); Armstrong Proposed Findings of Fact at 61; *see also* Gardner Expert Report, CX-44 at 41 (stating that, given the huge disparity in ratings between Penguins/Pirates and [REDACTED] games, no affiliate would be expected to agree to such terms allowing for their substitution).

<sup>253</sup> Armstrong lists the agreements which do not contain such a provision. *See* Armstrong Opposition at 70 (citing [REDACTED]

Findings of Fact at 62 n.15; Gardner Expert Report, CX-44 at 42-43. ]; *see also* Armstrong Proposed

<sup>254</sup> *See* DSNP Petition at 107 (citing [REDACTED] ); DSNP Reply at 56; DSNP Proposed Findings of Fact at 58-59.

<sup>255</sup> *See* DSNP Petition at 107 (citing 2005 Armstrong/FSNP Agreement, JX-1 at ARMSTRONG 000011; Affiliation Agreement between Armstrong Utilities, Inc. and [REDACTED] ); DSNP Proposed Findings of Fact at 58.

<sup>256</sup> *See* DSNP Petition at 107-08 (citing Thompson Test., Hr’g Tr. at 1292); DSNP Proposed Findings of Fact at 58-59.

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season games) is added to the “Penguins Baseline” ([REDACTED] regular season games) to arrive at an “Aggregate Games Guarantee” ([REDACTED] games) and that a rebate is triggered based on a shortfall in this Aggregate Games Guarantee.<sup>257</sup> Armstrong argues that the DSNP final offer is also triggered by a shortfall in the aggregate number of games.<sup>258</sup> The rebate in the DSNP final offer is triggered based on a shortfall below the “Pro Teams Aggregate Baseline,” which is defined as “Pittsburgh Pirates: [REDACTED] Pittsburgh Penguins: [REDACTED].”<sup>259</sup> While Armstrong’s expert understood this rebate provision to be triggered based on a shortfall in the aggregate number of games ([REDACTED]),<sup>260</sup> DSNP’s witness testified that the rebate is triggered by a shortfall in the baseline for each individual team.<sup>261</sup> Armstrong disputes that the term “Pro Teams Aggregate Baseline” can be read to refer to two individual team baselines.<sup>262</sup>

58. With respect to the rebate formula, Armstrong argues that the DSNP final offer would provide an unreasonably low rebate in the event of a shortfall.<sup>263</sup> In response, DSNP argues that this assumes that the rebate is triggered by a shortfall in the aggregate number of games rather than a shortfall in the baseline for each individual team.<sup>264</sup> Calculating the rebate based on a shortfall in the baseline for each individual team, DSNP submits that the formula in the DSNP final offer would result in a greater rebate than that provided in the Armstrong final offer.<sup>265</sup>

59. *Discussion.* We conclude that the rebate provision in the DSNP final offer is more favorable to Armstrong than the rebate provision in Armstrong’s own final offer. We reach this

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<sup>257</sup> See DSNP Petition at 109 (citing Armstrong Final Offer, JX-33 at ARMSTRONG 005702, § 8(k)(i)); DSNP Proposed Findings of Fact at 64.

<sup>258</sup> See Armstrong Opposition at 71; Armstrong Proposed Findings of Fact at 61.

<sup>259</sup> See DSNP Final Offer, JX-34 at DSNP 015055, § 5(d).

<sup>260</sup> See Gardner Test., Hr’g Tr. at 380-81, 399.

<sup>261</sup> See Tucker Test., Hr’g Tr. at 1153-55; see also DSNP Petition at 109; DSNP Reply at 57 (“Unlike the Armstrong Final Offer, the DSNP Final Offer does *not* state that the two baselines are to be added together, and DSNP’s witness testified unequivocally that they are *not* to be added for purposes of calculating the shortfall rebate. . . . Had DSNP intended that the denominator be [REDACTED] games, there would be no reason to separately state the baselines for the Pirates and Penguins in the Final Offer.”) (emphasis in original) (citations omitted); DSNP Proposed Findings of Fact at 60.

<sup>262</sup> See Armstrong Opposition at 71; Armstrong Proposed Findings of Fact at 62.

<sup>263</sup> See Armstrong Opposition at 70; Gardner Expert Report, CX-44 at 44-45; Gardner Test., Hr’g Tr. at 397-401.

<sup>264</sup> See DSNP Petition at 109-10; DSNP Proposed Findings of Fact at 60. The rebate formula in the DSNP final offer would provide Armstrong with a *pro rata* refund of fees based on multiplying the following three figures: (i) the percentage shortfall (the numerator of which is the shortfall of “Professional Events” below the “Pro Teams Aggregate Baseline” and the denominator of which is the “Pro Teams Aggregate Baseline”); (ii) [REDACTED] of the fees paid for the calendar year during which the shortfall occurred; (iii) the proportionate share of the team for which there is a shortfall to all “Professional Events” offered (Pittsburgh Pirates: [REDACTED]; Pittsburgh Penguins: [REDACTED]). See DSNP Final Offer, JX-34 at DSNP 015055, § 5(d)(ii). If the first number (the percentage shortfall) is calculated using a shortfall in the aggregate number of games rather than a shortfall in the games of the individual professional teams, the rebate will be smaller. For example, if the shortfall is 30 Penguins games and the first number is calculated using a shortfall in the aggregate number of games, the first number would be [REDACTED]. If, however, the first number is calculated using the shortfall in Penguins games, the first number would be larger ([REDACTED]), leading to a larger rebate.

<sup>265</sup> See Wyche Rebuttal Expert Report, RX-64 at 13 and Exhibit 1; see also DSNP Petition at 109-10; DSNP Proposed Findings of Fact at 60.

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conclusion based on DSNP's representations before the Arbitrator and the Commission that the rebate in its final offer is triggered by a shortfall in the baseline for each individual team rather than the aggregate number of games. Given our decision to select Armstrong's final offer, Armstrong must abide by its arguably less favorable rebate provision. Accordingly, we find that this difference in the final offers does not impact our fair market value analysis.

**c. [REDACTED] as a Recoverable Surcharge Cost**

60. Both final offers contain surcharge provisions which allow certain costs to be allocated to Armstrong on a *pro rata* basis in the event DSNP offers additional professional games. While both final offers would allow the costs of [REDACTED] the programming to be allocated to Armstrong on a *pro rata* basis, the DSNP final offer also includes [REDACTED] whereas the Armstrong final offer does not.<sup>266</sup> Armstrong argues that this would allow DSNP to pass through to Armstrong undefined [REDACTED].<sup>267</sup> DSNP disagrees, noting that the provision strictly limits costs to those "directly attributable" to the additional games.<sup>268</sup> Moreover, DSNP notes that the 2005 Armstrong/FSNP Agreement as well as Armstrong's current affiliation agreement with [REDACTED] do not include any limitations on surchargeable costs, and thus [REDACTED] can be passed through to Armstrong under those agreements.<sup>269</sup> DSNP notes that Armstrong's own expert conceded that a limitation on surchargeable costs is an improvement over affiliation agreements that do not contain such limitations.<sup>270</sup> In addition, DSNP submits that Armstrong's [REDACTED] contract with DSNP agreeing to a surcharge for additional Pirates games expressly includes [REDACTED] as a surchargeable cost.<sup>271</sup> In its final offer, Armstrong has proposed a surcharge provision that is similar to language found in DSNP's affiliation agreements with [REDACTED] and [REDACTED], which do not include [REDACTED] as a surchargeable cost.<sup>272</sup>

61. *Discussion.* We conclude that the surcharge provision in the Armstrong final offer most closely approximates fair market value. As an initial matter, the surcharge provisions in both final offers are an improvement for Armstrong compared to those DSNP affiliation agreements that contain no

<sup>266</sup> See DSNP Final Offer, JX-34 at DSNP 015056, § 5(e); Armstrong Final Offer, JX-33 at ARMSTRONG 005699-5700, § 5(e).

<sup>267</sup> See Gardner Expert Report, CX-44 at 46-49; Armstrong Opposition at 71; Armstrong Proposed Findings of Fact at 63.

<sup>268</sup> See DSNP Petition at 110 (citing DSNP Final Offer, JX-34 at DSNP 015056, § 5(e)).

<sup>269</sup> See *id.* at 111; DSNP Proposed Findings of Fact at 57; see also 2005 Armstrong/FSNP Agreement, JX-1 at ARMSTRONG 000009-10; 2006 Armstrong/[REDACTED]; Carriage Agreement between Armstrong Utilities, Inc. and [REDACTED]

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<sup>270</sup> See DSNP Petition at 111 (citing Gardner Test., Hr'g Tr. at 465 (agreeing that the terms of the DSNP final offer were an improvement over the other agreements that did not have any limitation on surchargeable costs)).

<sup>271</sup> See *id.* (citing [REDACTED] Armstrong/DSNP Additional Events Addendum, JX-39 at DSNP 000076); DSNP Proposed Findings of Fact at 57; Gardner Test., Hr'g Tr. at 467-68.

<sup>272</sup> See Gardner Expert Report, CX-44 at 48-49; [REDACTED]

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limitations on surchargeable costs.<sup>273</sup> There is no evidence, however, that those DSNP affiliation agreements that contain limits on surchargeable costs allow [REDACTED] to be allocated to the MVPD.<sup>274</sup> Accordingly, we find that DSNP’s inclusion of [REDACTED] as surchargeable does not “most closely approximate fair market value” when compared to the Armstrong final offer.

d. [REDACTED]

62. The DSNP final offer would [REDACTED], whereas the Armstrong final offer would allow [REDACTED] rate if and when all the other distributors of FSNP agree to a [REDACTED].<sup>275</sup> DSNP contends that the renewals it has negotiated since late 2009, including the [REDACTED] renewal in [REDACTED] and the [REDACTED] renewal in [REDACTED], all have [REDACTED].<sup>276</sup> DSNP also notes that Armstrong’s [REDACTED] contract with DSNP agreeing to a surcharge for additional Pirates games included only a [REDACTED].<sup>277</sup> Armstrong counters that this [REDACTED] surcharge agreement did not change the zone definitions from the 2005 Armstrong/FSNP Agreement.<sup>278</sup> Armstrong also notes that [REDACTED] continue to each retain [REDACTED].<sup>279</sup>

63. *Discussion.* We conclude that the [REDACTED] in the DSNP final offer most closely approximates fair market value. The record evidence here indicates that DSNP’s most recent affiliation agreements, including with [REDACTED] as well as with [REDACTED], include a [REDACTED] rate. We also agree with DSNP that the [REDACTED] does not have a material impact on the rates for FSNP. As DSNP explains, when [REDACTED], subscribers in one former [REDACTED] will face a rate increase while subscribers in the other former [REDACTED] will enjoy a rate decrease.<sup>280</sup>

<sup>273</sup> See, e.g., [REDACTED].

<sup>274</sup> See *supra* n.272; see also [REDACTED].

<sup>275</sup> See DSNP Final Offer, JX-34 at DSNP 015081, Exhibit C; Armstrong Final Offer, JX-33 at ARMSTRONG 005695, § 8(a)(i); see also DSNP Petition at 111-12; Armstrong Opposition at 72.

<sup>276</sup> See DSNP Petition at 112; [REDACTED]

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<sup>277</sup> See DSNP Petition at 112; 2010 Armstrong/DSNP Additional Events Addendum, JX-39 at DSNP 000076, §4.

<sup>278</sup> See Armstrong Opposition at 73.

<sup>279</sup> See *id.*; Armstrong Proposed Findings of Fact at 55; Wyche Test., Hr’g Tr. at 973-74.

<sup>280</sup> See DSNP Reply at 58 (“The essence of a weighted average is that, to the extent that the average increases the rate for the [REDACTED] subscribers, it decreases the rate for [REDACTED] subscribers such that there is no adverse economic impact.”); see *id.* at 13 n.7 (“Armstrong has approximately [REDACTED] FSNP subscribers in [REDACTED] and over [REDACTED] subscribers in [REDACTED]. (JX-208). If the weighted average rate for (continued....)

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64. The Lifeline provisions in the Armstrong and DSNP final offers differ in two respects: (i) the definition of the Lifeline Basic Tier; and (ii) the Lifeline tier exclusion.<sup>281</sup> With respect to the definition of the Lifeline Basic Tier, the definition in the DSNP final offer is consistent with the 2005 Armstrong/FSNP Agreement, while the Armstrong final offer would expand the Lifeline Basic Tier to include additional programming.<sup>282</sup> Armstrong does not dispute that it seeks to broaden this definition and states that it wants greater flexibility to develop lower cost packages for its customers.<sup>283</sup>

65. Both final offers contain provisions requiring Armstrong to deliver FSNP to [REDACTED] of Armstrong's total subscribers.<sup>284</sup> Both final offers also allow Armstrong to exclude Lifeline subscribers from the total number of subscribers before applying this percentage, provided that the number of Lifeline subscribers does not exceed [REDACTED] (in the case of the Armstrong final offer<sup>285</sup>) or [REDACTED] (in the case of the DSNP final offer<sup>286</sup>) of total subscribers. Thus, if Armstrong has [REDACTED] subscribers, the Armstrong final offer would allow Armstrong to exclude up to [REDACTED] Lifeline subscribers (*i.e.*, [REDACTED]) from its total number of subscribers before applying the [REDACTED] penetration requirement. This would require Armstrong to deliver FSNP to at least [REDACTED] subscribers ([REDACTED]). This results in a required penetration level of [REDACTED] of total subscribers (*i.e.*, [REDACTED]).<sup>287</sup> Under the DSNP final offer, Armstrong could exclude up to [REDACTED] Lifeline subscribers (*i.e.*, [REDACTED]) from its total number of subscribers before applying the [REDACTED] penetration requirement. This would require Armstrong to deliver FSNP to at least [REDACTED] subscribers ([REDACTED]). This results in a required penetration level of [REDACTED] of total subscribers (*i.e.*, [REDACTED]).<sup>288</sup>

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[REDACTED] would 'inflate' the amount paid by Armstrong for [REDACTED] subscribers, by definition it would result in a reduction of the rate otherwise payable by Armstrong for the [REDACTED] subscribers . . .").

<sup>281</sup> A Lifeline tier is a low-cost package of programming that contains a limited number of channels. *See* Wittman Test., Hr'g Tr. at 272.

<sup>282</sup> *Compare* 2005 Armstrong/FSNP Agreement, JX-1 at ARMSTRONG 000001, § 1(e) *with* Armstrong Final Offer, JX-33 at ARMSTRONG 005685, § 1(g); *see also* DSNP Petition at 113-14; DSNP Proposed Findings of Fact at 56. [REDACTED]

I.

<sup>283</sup> *See* Armstrong Opposition at 74; Wittman Test., Hr'g Tr. at 272-74.

<sup>284</sup> *Compare* Armstrong Final Offer, JX-33 at ARMSTRONG 005685, § 1(i) ("Permissible Tier") *with* DSNP Final Offer, JX-34 at DSNP 015050, § 1(h) ("Minimum Tier").

<sup>285</sup> *See* Armstrong Final Offer, JX-33 at ARMSTRONG 005685, § 1(i). Armstrong notes that its [REDACTED] exclusion is consistent with the 2005 Armstrong/FSNP Agreement. *See* Wittman Test., Hr'g Tr. at 295.

<sup>286</sup> *See* DSNP Final Offer, JX-34 at DSNP 015050, § 1(h)

<sup>287</sup> *See* DSNP Petition at 114; DSNP Proposed Findings of Fact at 57; Gardner Test., Hr'g Tr. at 453-56.

<sup>288</sup> *See* DSNP Petition at 114; DSNP Proposed Findings of Fact at 56-57; Gardner Test., Hr'g Tr. at 453-56.

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66. DSNP states that lowering the Lifeline exclusion from [REDACTED] to [REDACTED] was required by its new rights agreement with the Pirates, which requires a minimum penetration of [REDACTED].<sup>289</sup> DSNP argues that, if Armstrong were to exclude Lifeline subscribers up to the maximum of [REDACTED] as provided under the Armstrong final offer, Armstrong would deliver FSNP to only [REDACTED] of its subscribers and thereby place DSNP in violation of its rights agreement with the Pirates.<sup>290</sup> Armstrong disputes that its [REDACTED] tier exclusion would conflict with DSNP's rights agreement with the Pirates.<sup>291</sup> Armstrong argues that DSNP's rights agreement with the Pirates requires a minimum penetration of [REDACTED] across all systems carrying the games, not on each individual system.<sup>292</sup> Moreover, Armstrong notes that the required penetration level in the [REDACTED] is [REDACTED], thus undermining DSNP's claim that it must ensure that Armstrong satisfies a [REDACTED] penetration requirement to enable DSNP to comply with the Pirates deal.<sup>293</sup>

67. DSNP argues that reducing the Lifeline exclusion to [REDACTED] does not mean that Armstrong must limit its Lifeline subscribers to only [REDACTED] of its total subscribers.<sup>294</sup> For example, more than [REDACTED] of Armstrong's subscribers could subscribe to Lifeline service provided that Armstrong delivers FSNP on basic to the remaining subscribers and satisfies the [REDACTED] overall penetration requirement.<sup>295</sup> In any event, DSNP notes that Mr. Wittman, Armstrong's Vice President of Cable Marketing, testified that Lifeline service is offered to less than [REDACTED] of Armstrong subscribers.<sup>296</sup> Moreover, Armstrong's website states that Armstrong does not offer Lifeline service at all.<sup>297</sup> Armstrong does not dispute these facts or the testimony of DSNP's expert, Mr. Thompson, that "Lifeline is not a significantly subscribed to level of service" at Armstrong.<sup>298</sup>

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<sup>289</sup> See DSNP Petition at 114; see also DSNP Proposed Findings of Fact at 56-57; [REDACTED]

I.

<sup>290</sup> See DSNP Petition at 114; DSNP Proposed Findings of Fact at 56-57; Gardner Test., Hr'g Tr. at 453-56.

<sup>291</sup> See Armstrong Opposition at 75 (citing Gardner Test., Hr'g Tr. at 540-41).

<sup>292</sup> See *id.* at 75; Armstrong Proposed Findings of Fact at 64. Armstrong's expert, Mr. Gardner, stated that he "read this as stating that FSN Pittsburgh can comply with this provision, provided the average is no less than [REDACTED]." Gardner Test., Hr'g Tr. at 537-41; see Armstrong Proposed Findings of Fact at 64.

<sup>293</sup> See Armstrong Opposition at 75 n.54; Armstrong Proposed Findings of Fact at 63-64; Gardner Test., Hr'g Tr. at 540-41.

<sup>294</sup> See DSNP Petition at 114.

<sup>295</sup> See *id.* For example, assuming Armstrong has [REDACTED] subscribers, it could exclude [REDACTED] Lifeline subscribers ([REDACTED] of all subscribers) and still satisfy the required penetration level provided the remaining [REDACTED] subscribers ([REDACTED] ) receive FSNP.

<sup>296</sup> See *id.* (citing Wittman Test., Hr'g Tr. at 292-93).

<sup>297</sup> See *id.* at 114-15 (citing Armstrong Frequently Asked Questions, RX-85 at FAQ 17 ("At this time, Armstrong does not offer a lifeline package.)); DSNP Proposed Findings of Fact at 57.

<sup>298</sup> See DSNP Petition at 115 (citing Thompson Test., Hr'g Tr. at 1291-92); DSNP Proposed Findings of Fact at 57; Armstrong Opposition at 74. Armstrong states that it offers a Lifeline service today in "about 50 zip codes." See Wittman Test., Hr'g Tr. at 269.

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68. *Discussion.* We conclude that the provisions in the Armstrong final offer pertaining to the Lifeline tier most closely approximate fair market value. As an initial matter, we find that the difference in the proposed Lifeline tier exclusion percentages does not have a material impact on either final offer. Whether the exclusion is set at [REDACTED] or [REDACTED], the record is clear that Armstrong does not have a sufficient number of Lifeline subscribers to come close to this number at present. Moreover, even if Armstrong did have a large base of Lifeline subscribers, the record evidence here indicates that the required penetration level of [REDACTED] under the Armstrong final offer would not place DSNP in violation of the [REDACTED] penetration requirement in its agreement with the Pirates, as demonstrated by the [REDACTED] penetration requirement in the [REDACTED]. Moreover, we find no basis to conclude that the definition of the Lifeline Basic Tier in the Armstrong final offer is inconsistent with market-based terms considering that a recent FSNP affiliation agreement negotiated by another Cohort Affiliate contains a similarly broad definition.<sup>299</sup>

**f. Advertising Avails and Advertising Exclusivities**

69. Both final offers allow Armstrong to use two minutes of advertising time per hour during FSNP programming (called “ad avails”).<sup>300</sup> The final offers differ with respect to whether DSNP can reserve exclusive advertising categories (called “ad exclusives”). The DSNP final offer would place no restrictions on DSNP’s ability to designate exclusive advertising categories,<sup>301</sup> while the Armstrong final offer does not contain any provision allowing DSNP to designate exclusive advertising categories.<sup>302</sup> Armstrong’s expert, Mr. Gardner, testified that the ad exclusives provision in the DSNP final offer would allow DSNP to reserve broad categories of advertising to itself and thereby “undermine Armstrong’s ability to monetize the 2 minutes of commercial advertising time per hour.”<sup>303</sup> In response, DSNP argues that RSN affiliation agreements uniformly contain ad exclusives;<sup>304</sup> every one of Armstrong’s affiliation agreements with [REDACTED] contains ad exclusives;<sup>305</sup> DSNP’s affiliation agreements that provide for

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<sup>299</sup> See [REDACTED]

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<sup>300</sup> See Armstrong Final Offer, JX-33 at ARMSTRONG 005703, § 9(a); DSNP Final Offer, JX-34 at DSNP 015062-63, § 7(a). Although Armstrong did not have any ad avails under the 2005 Armstrong/FSNP Agreement, Armstrong had two minutes of ad avails under its 2000 affiliation agreement for FSNP. See Gardner Test., Hr’g Tr. at 456; 2005 Armstrong/FSNP Agreement, JX-1; Affiliation Agreement between Armstrong Utilities, Inc. and Fox Sports Net Pittsburgh, L.P. (effective April 1, 2000), JX-3 at ARMSTRONG 000032-33, § 6; see also DSNP Petition at 115-16; DSNP Proposed Findings of Fact at 55-56.

<sup>301</sup> See DSNP Final Offer, JX-34 at DSNP 015080, § 7(b).

<sup>302</sup> See DSNP Petition at 118; DSNP Proposed Findings of Fact at 55-56. Armstrong’s expert, Mr. Gardner, contends that nothing in the Armstrong final offer prevents DSNP from declaring ad exclusives. See Gardner Test., Hr’g Tr. at 534-35; Armstrong Proposed Findings of Fact at 65-66.

<sup>303</sup> See Gardner Expert Report, CX-44 at 51-52.

<sup>304</sup> Armstrong’s expert, Mr. Gardner, admitted that it is “very common for [RSNs] to retain exclusive advertising categories.” See Gardner Test., Hr’g Tr. at 460. DSNP’s expert, Mr. Thompson, stated that “advertising exclusivities are contained in virtually every affiliation agreement I’ve ever seen.” See Thompson Test., Hr’g Tr. at 1293; see also DSNP Proposed Findings of Fact at 55.

<sup>305</sup> Armstrong’s affiliation agreements with [REDACTED]

(continued....)

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ad avails all contain ad exclusives;<sup>306</sup> and DSNP's [REDACTED

] .<sup>307</sup> While Armstrong does not dispute that RSN affiliation agreements often include ad exclusives, it argues that DSNP's ad exclusive is not reflective of a market-based term because it is unrestricted in scope.<sup>308</sup>

70. *Discussion.* We conclude that the ad exclusives provision in the DSNP final offer most closely approximates fair market value. The record reflects that RSN affiliation agreements in general, and the affiliation agreements that both DSNP and Armstrong have entered into in particular, contain ad exclusives. Moreover, DSNP has entered into affiliation agreements with Cohort Affiliates containing the broad ad exclusivity language contained in the DSNP final offer.<sup>309</sup> There is no support, however, for the proposal in the Armstrong final offer to have no provision pertaining to ad exclusives.

**g. Carriage of FSNP in the Event of an NCTC Agreement.**

71. In its final offer, Armstrong proposes to modify a provision of the 2005 Armstrong/FSNP Agreement which allows Armstrong to "opt-out" of its affiliation agreement in favor of an agreement negotiated by the National Cable Television Cooperative ("NCTC") for carriage of FSNP.<sup>310</sup> Under the 2005 Armstrong/FSNP Agreement, Armstrong could "opt-out" provided that Armstrong (i) would carry FSNP until the end of the contract term (June 30, 2010) (the "continued carriage" protection); and (ii) would not move FSNP to a less-penetrated package or tier of services, or withdraw or discontinue distribution of FSNP in any system (the "non-migration protection").<sup>311</sup> The Armstrong final offer would

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]; *see also* Thompson Expert Report, RX-74 at 4-6; Gardner Test., Hr'g Tr. 461-62; DSNP Proposed Findings of Fact at 54.

<sup>306</sup> See [REDACTED

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<sup>307</sup> See [REDACTED  
to afford to [REDACTED

]. The rights agreement requires DSNP

]. Armstrong's expert, Mr. Gardner, acknowledged that DSNP must have ad exclusives to comply with its rights agreement with the Pirates. *See* Gardner Test., Hr'g Tr. at 463. DSNP's expert, Mr. Thompson, testified that ad exclusives are often required as a result of the terms of the rights agreements with sports teams that want to retain advertising time for their sponsors. *See* Thompson Test., Hr'g Tr. at 1293-94; *see* DSNP Proposed Findings of Fact at 54-55.

<sup>308</sup> *See* Armstrong Opposition at 76; Gardner Expert Report, CX-44 at 52.

<sup>309</sup> See [REDACTED

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<sup>310</sup> Compare 2005 Armstrong/FSNP Agreement, JX-1 at ARMSTRONG 000003, § 3 with Armstrong Final Offer, JX-33 at ARMSTRONG 005689, § 3.

<sup>311</sup> *See* 2005 Armstrong/FSNP Agreement, JX-1 at ARMSTRONG 000003, § 3. Armstrong's President, Mr. Ross, referred to the NCTC provision in the 2005 Armstrong/FSNP Agreement as "what I would call our standard NCTC opt-in language." *See* Ross Test., Hr'g Tr. at 118-19.

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**[REDACTED]** <sup>312</sup> DSNP argues that this provision is not sufficient to ensure that FSNP will be carried for the five-year term of the Armstrong final offer;<sup>313</sup> does not satisfy the requirement in the *Liberty Media Order* arbitration conditions that the final offer have at least a three-year term;<sup>314</sup> and is not standard in the marketplace (as evidenced by the 2005 Armstrong/FSNP Agreement).<sup>315</sup> Armstrong responds by noting that the “opt-out” provision is just one reason why the agreement may be terminated before the conclusion of its term (along with reasons such as breach, default, and force majeure), but that does not change the five-year term of the agreement.<sup>316</sup> Moreover, Armstrong notes that DSNP and NCTC have not yet entered into an affiliation agreement and that DSNP can seek to include the continued carriage and non-migration protections in any agreement it eventually reaches with NCTC.<sup>317</sup>

72. *Discussion.* We conclude that the NCTC “opt-out” provision in the Armstrong final offer most closely approximates fair market value. Armstrong’s ability and willingness to “opt-out” of its affiliation agreement with DSNP in favor of an agreement negotiated by NCTC is dependent on two conditions precedent: (i) DSNP must reach an affiliation agreement with NCTC; and (ii) Armstrong must find the NCTC affiliation agreement with DSNP more favorable than its own affiliation agreement with DSNP. We conclude that the theoretical potential for Armstrong to exercise its right to “opt-out” of its affiliation agreement with DSNP does not reduce the five-year term of the Armstrong final offer any more than the theoretical possibility that Armstrong will breach or default on the affiliation agreement. Thus, we conclude that the “opt-out” provision does not cause the Armstrong final offer to violate the three-year term requirement of the *Liberty Media Order* arbitration conditions. Moreover, we find no basis to conclude that the “opt-out” provision in the Armstrong final offer is inconsistent with market-based terms considering that a recent FSNP affiliation agreement negotiated by another Cohort Affiliate does not contain continued carriage and non-migration protections.<sup>318</sup>

**h. Conclusion**

73. Under the *Liberty Media Order* arbitration conditions, we must select one final offer or the other.<sup>319</sup> As discussed at the outset, we do not have the discretion to craft our own affiliation agreement by selecting some terms from one final offer and other terms from the other final offer or by imposing our own terms.<sup>320</sup> As summarized in Table C below, we conclude that certain non-rate terms in the final offers favor the DSNP final offer as being more consistent with fair market value, whereas other non-rate terms favor the Armstrong final offer.

<sup>312</sup> See Armstrong Final Offer, JX-33 at ARMSTRONG 005689, § 3.

<sup>313</sup> See DSNP Petition at 120; DSNP Proposed Findings of Fact at 65.

<sup>314</sup> See DSNP Pre-Hearing Brief at 15 n.7; *Liberty Media Order*, 23 FCC Rcd at 3347, Appendix B, Condition IV, § A “Commercial Arbitration Remedy,” ¶ 10.

<sup>315</sup> See DSNP Petition at 120; DSNP Proposed Findings of Fact at 65.

<sup>316</sup> See Armstrong Opposition at 77; Armstrong Proposed Findings of Fact at 21.

<sup>317</sup> See Armstrong Opposition at 77-78; see also Armstrong Proposed Findings of Fact at 21.

<sup>318</sup> See **[REDACTED]** <sup>319</sup> **[REDACTED]** <sup>320</sup> **[REDACTED]**

<sup>319</sup> See *supra* ¶ 8.

<sup>320</sup> See *id.*

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Table C

Non-Rate Terms	Final Offer Most Closely Approximating Fair Market Value
Use of [REDACTED] to Cure Shortfalls	Armstrong
Rebate for Shortfalls in Professional Games	DSNP
[REDACTED] as a Recoverable Surcharge Cost	Armstrong
[REDACTED ]	DSNP
Lifeline Definition and Lifeline Tier Exclusion	Armstrong
Advertising Avails and Advertising Exclusivities	DSNP
Carriage of FSNP in the Event of an NCTC Agreement	Armstrong

We do not believe that the non-rate terms favoring the DSNP final offer tip the scales in favor of finding that the DSNP final offer most closely approximates fair market value considering that the (i) DSNP final offer would require Armstrong to pay higher rates than MVPDs with fewer subscribers and that generate less revenue for DSNP; (ii) neither of the methodologies put forth by DSNP is probative of fair market value; and (iii) on balance, the other rate terms and non-rate terms favor the Armstrong final offer as being more consistent with fair market value.<sup>321</sup>

#### 4. Recovery of Programming Costs

74. Pursuant to the *Liberty Media Order* arbitration conditions, an RSN's costs are relevant insofar as the conditions provide that an arbitrator may not select a final offer that does not permit the RSN "to recover a reasonable share of the costs of acquiring the programming at issue."<sup>322</sup> DSNP argues that the rates in the Armstrong final offer do not reflect the increasing rights fees for professional sporting events.<sup>323</sup> DSNP contends that Armstrong did not consider that the rights fees DSNP pays for major professional sporting events will increase by [REDACTED ]<sup>324</sup> and that such fees account for [REDACTED] DSNP's operating costs.<sup>325</sup> In response, Armstrong notes that DSNP has admitted that its operating margins are [REDACTED ]<sup>326</sup>.

<sup>321</sup> See *supra* § III.C.2 (other rate terms) and § III.C.3 (non-rate terms).

<sup>322</sup> See *Liberty Media Order*, 23 FCC Rcd at 3347, Appendix B, Condition IV, § B "Rules of Arbitration," ¶ 4.

<sup>323</sup> See DSNP Petition at 103-04; see also DSNP Proposed Findings of Fact at 32-33.

<sup>324</sup> See Tucker Test., Hr'g Tr. at 1086 (stating that professional rights fees are increasing over time at a rate of [REDACTED]); see also Wyche Expert Report, RX-50 at 16-17; DSNP Proposed Findings of Fact at 32. According to DSNP, the renewal of the Penguins rights agreement will result in an additional [REDACTED] increase in annual rights fees beginning with the [REDACTED] Penguins season, further decreasing DSNP's operating margin. See Tucker Test., Hr'g Tr. at 1087-89; see also Wyche Expert Report, RX-50 at 17; DSNP Proposed Findings of Fact at 33. Armstrong disputes this claim, arguing that DSNP had not signed a renewal agreement with the Penguins as of the January 2011 hearing. See Armstrong Opposition at 79; Armstrong Proposed Findings of Fact at 67; Tucker Test., Hr'g Tr. at 1169-73.

<sup>325</sup> See Tucker Test., Hr'g Tr. at 1086; but see Siwek Test., Hr'g Tr. at 686-87 (testifying that his "guess" was that professional rights fees constituted "at least [REDACTED] percent; perhaps [REDACTED] percent of the operating costs" of DSNP).

<sup>326</sup> See Armstrong Opposition at 78; Armstrong Proposed Findings of Fact at 66-67. Armstrong's expert, Mr. Gardner, opined that "RSN margins are in the range of approximately [REDACTED]." See Gardner Expert Report, CX-44 at 12. DSNP's expert, Mr. Thompson, stated that DSNP's average operating margin will be [REDACTED ], which he opined was a "minimally acceptable level of return" and that a [REDACTED] return was "a realistic target level" over time. Thompson Expert Report, RX-74 at 12; see also Wyche Expert Report, RX-50 (continued....)

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Moreover, Armstrong notes that the difference in the rates in the parties' final offers amounts to an average of only [REDACTED] per year over the course of the proposed five-year term.<sup>327</sup> Moreover, DSNP's CFO, Mr. Tucker, testified that while the Armstrong final offer "will have a negative impact on [DSNP's] overall margins," it will not drive DSNP down to a "zero margin."<sup>328</sup>

75. *Discussion.* DSNP has not provided any evidence that demonstrates that the Armstrong final offer will not enable DSNP to recover a reasonable share of the costs of acquiring programming for FSNP. At most, the Armstrong final offer could reduce DSNP's expected profit margin, but this alone provides no basis for rejecting the Armstrong final offer without a clear showing that the Armstrong final offer will deny DSNP the ability to recover a reasonable share of its costs of acquiring programming.

**IV. CONCLUSION**

76. For the reasons set forth above, we deny DSNP's Petition and conclude, consistent with the arbitrator's decision, that the final offer submitted by Armstrong most closely approximates the fair market value of the programming carriage rights at issue and that there is no evidence demonstrating that the Armstrong final offer will not enable DSNP to recover a reasonable share of the costs of acquiring programming for FSNP.

**V. ORDERING CLAUSES**

77. Accordingly, **IT IS ORDERED** that, pursuant to Sections 4(i) and 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), the *Petition for De Novo Review* filed by DIRECTV Sports Net Pittsburgh, LLC pursuant to the terms of the *Liberty Media Order IS DENIED*.

78. This action is taken pursuant to authority delegated by Section 0.283 of the Commission's rules, 47 C.F.R. § 0.283.

FEDERAL COMMUNICATIONS COMMISSION

William T. Lake  
Chief, Media Bureau

(Continued from previous page) \_\_\_\_\_  
at 16 ("RSNs typically achieve an average annual operating income margin 'over time' between [REDACTED] and [REDACTED]."); DSNP Proposed Findings of Fact at 32. DSNP's expert, Mr. Wyche, testified that [REDACTED] J. See Wyche Test., Hr'g Tr. at 905-06.

<sup>327</sup> See Armstrong Opposition at 78; *supra* ¶ 13. Armstrong opines that a review of DSNP's chart of operating margins demonstrates that this differential will not seriously impact DSNP's margins. See Armstrong Opposition at 78 (citing Thompson Expert Report, RX-74 at Exhibit 5).

<sup>328</sup> See Tucker Test., Hr'g Tr. at 1175-77; see also Wyche Test., Hr'g Tr. at 1051 (agreeing that he did not give an opinion in his reports that the Armstrong final offer would prevent DSNP from recovering a reasonable portion of costs to acquire the programming at issue); Thompson Test., Hr'g Tr. at 1315 (agreeing that he did not suggest in his expert report nor did he testify that the Armstrong final offer would not permit DSNP to recover a reasonable share of its costs).

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**REDACTED VERSION – RELEASED AUGUST 31, 2011****Appendix A****Rates for Armstrong Under the DSNP Final Offer<sup>329</sup>****Zone 1****[REDACTED]**

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<sup>329</sup> See Wyche Expert Report, RX-50 at Tables 2, 3, and 4. These are actual rates for **[REDACTED]** in all zones. These are not the actual rates for **[REDACTED]**. See *id.* at 9-10; *supra* ¶ 17. With respect to **[REDACTED]**, (i) its rates for **[REDACTED]** rates, based on the relative number of Armstrong subscribers in each sub-zone (see Wyche Expert Report, RX-50 at 10; Wyche Test., Hr’g Tr. at 890-91); and (ii) its rates for Zones 2 and 4 are “normalized” to include **[REDACTED]** (see Wyche Expert Report, RX-50 at 9-10; Wyche Test., Hr’g Tr. at 890-91). With respect to **[REDACTED]**, (i) its rates for **[REDACTED]**, based on the relative number of Armstrong subscribers in each sub-zone (see Wyche Expert Report, RX-50 at 10; Wyche Test., Hr’g Tr. at 890-91); and (ii) its rates for Zones 1, 2, and 4 are “normalized” to include **[REDACTED]** (see Wyche Expert Report, RX-50 at 9-10; Wyche Test., Hr’g Tr. at 890-91).

REDACTED VERSION – RELEASED AUGUST 31, 2011

*Zone 2*

[REDACTED]

*Zone 4*

[REDACTED]

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**REDACTED VERSION – RELEASED AUGUST 31, 2011****Appendix B****Rates for Armstrong Under the Armstrong Final Offer<sup>330</sup>****Zone 1****[REDACTED]**

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<sup>330</sup> See Wyche Expert Report, RX-50 at Tables 2, 3, and 4. These are actual rates for [REDACTED] in all zones. These are not the actual rates for [REDACTED]. See *supra* n.329 (explaining how rates were calculated). The Armstrong rates are annualized because they increase in [REDACTED] of each year pursuant to the Armstrong final offer, whereas the rates of the other listed Cohort Affiliates increase in [REDACTED] of each year. See Wyche Expert Report, RX-54, Exhibit D. The Armstrong [REDACTED], based on the relative number of Armstrong subscribers in each sub-zone. See *id.*

REDACTED VERSION – RELEASED AUGUST 31, 2011

*Zone 2*

[REDACTED]

*Zone 4*

[REDACTED]